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Compensation for Harm from Charitable Activity

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I
INTRODUCTION

On a wintry evening, Carlyle and Perry walk along a city sidewalk near the Mercy Shelter for the Homeless, where Sam, a Shelter volunteer, has just finished pouring sand on the slippery sidewalk. Carlyle opens the door to the shelter and enters for the night. As Perry adjusts his stride to avoid the open door, he falls on the ice, spraining his back and tearing his coat. Perry's subsequent lawsuit will allege that Sam (the volunteer) negligently failed to cover the patch of ice with sand. The suit will seek general and special damages against Sam in his individual capacity and Mercy Shelter on the theory of *respondeat superior*. Shall Sam and Mercy Shelter be compelled to pay full tort damages to Perry? If so, what will happen to Carlyle and the other beneficiaries of the shelter?

For many years the doctrine of charitable immunity would have foreclosed suit,[1] but almost all states have either abandoned or substantially constricted the doctrine.[2] Limitations on the liability of volunteers exist in some states, although these laws may offer little real protection.[3] Thus, Mercy and Sam may be obligated to compensate Perry completely for his injuries. As a result, Mercy may not be able to assist Carlyle or otherwise pursue its primary charita-

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1 *See* Bradley Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969, 971-72 (1979) (providing a brief history of the doctrine); Ronald Lipson, *Charitable Immunity: The Plague of Modern Tort Concepts*, 7 CLEV.-MARSHALL L. REV. 483, 484 (1958); Annotation, *Tort Immunity of Nongovernmental Charities*, 25 A.L.R. 4TH 517 (1983).

2 Case law and statutes are compiled in CHARLES TREMPER, RECONSIDERING LEGAL LIABILITY AND INSURANCE FOR NONPROFIT ORGANIZATIONS 187-201 (1989).

3 *See infra* notes 54-55 and accompanying text.

ble mission. Sam and others like him may be less inclined to volunteer in the future.

Most states abrogated charitable immunity by imposing full liability for damages without adequate consideration of whether the unique characteristics of charitable organizations and volunteers warrant some other arrangement. For many years after the abolition of charitable immunity, the infrequency of suits against charitable actors and the availability of inexpensive liability insurance minimized the impact of the new rules. Not until the mid-1980s, when the price of liability insurance soared as coverage diminished[4] and a few suits against charitable organizations and volunteers attracted substantial media attention,[5] did the issue arouse much interest.

Although the amount charitable organizations pay for liability insurance is certainly a cause for concern, the proper nature of that concern is easily misunderstood. If one were interested only in reducing charitable organizations' costs, such measures as rent control and lower gasoline taxes would have a greater impact. What gives the debate about tort rules for charitable actors extra significance is its role in defining the relationship between charitable organizations and the community they serve.

In response to the prospect of charitable organizations closing their doors and potential volunteers staying home, state legislatures enacted a spate of laws limiting the liability of volunteers, especially volunteer board members.[6] While most of this legislative activity has been at the state level, Congress has also taken up the issue.[7] In

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4 *See infra* notes 99-104 and accompanying text.

5 *E.g.*, Thomas Heath, *$45,000 Award to Molested Va. Youth Hailed as Victory by Scouts*, Wash. Post, Jan. 12, 1989, at D1, col. 1; Lisa Green Markoff, *A Volunteer's Thankless Task*, Nat'l L.J., Sept. 19, 1988, at 1, col. 1; Gary Taylor, *Goodwill Must Pay $5M in Murder by Parolee-Employee*, Nat'l L.J., June 8, 1987, at 22, col. 1; David Rohn, *YMCA, Pool Victim Settle: 5-Year-Old to Get $4,000 a Month Initially*, Wash. Post, May 17, 1978, at A4, col. 1; *see also* Kristen A. Goss, *Boy Scouts of America Win Victory in Sex Abuse Case; Jury Fails to Find Negligence by National Organization*, CHRON. PHILANTHROPY, Jan. 24, 1989, at 15, col. 1 (a well-publicized sexual molestation claim against the Boy Scouts which sought $430,000,000. At trial, the judge dismissed the punitive damages claim and the jury absolved the national organization, while holding the local chapter liable for $45,000 compensatory damages); Damond Benningfield, *Who's Minding The Nonprofits?*, TEXAS INSUROR, Jan./Feb. 1987 (a sexual molestation claimant sought $24,000,000).

6 *See infra* notes 55-56 and accompanying text.

7 The power of Congress to enact tort law is limited. Both the constitutional reservation of rights to the states, U.S. CONST. amend. X, and the enumeration of powers that the Constitution bestows upon the Congress, U.S. CONST. art. 1, § 8, constrict federal authority. In the past, Congress has exercised substantial authority under the Interstate Commerce Clause, *see* Perez v. United States, 402 U.S. 146 (1971) (upholding conviction of neighborhood loan shark under federal law on basis of congressional finding that loan sharks, as a group, harm interstate commerce), or has conditioned acceptance of federal funds on compliance with certain standards. *See* South Dakota v. Dole,

the 1990 session, the House of Representatives passed a bill that provided incentives for states to limit the liability of charitable organizations and volunteers.[8] This bill was a variant of the Volunteer Protection Act,[9] which Congressman John Porter has introduced in each session since 1986.[10] The House bill for the Act was numbered 911 to convey Porter's conviction that volunteer liability constitutes an emergency threatening the delivery of vital services.[11] President Bush's concern about tort liability of volunteers and their sponsoring organizations led him to propose a model volunteer protection law and to call for support of a "privately funded, nongovernment controlled center to address the concerns of volunteer organizations about tort law liability."[12]

Most legislative changes and proposals attempt to resolve the tension between recovery and liability by altering the standards for imposition of liability, usually by requiring proof of dereliction greater than mere negligence.[13] This approach allows some injured parties to recover fully through tort and completely forecloses recovery for others. Although the approach serves the goals of reduc-

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483 U.S. 203 (1987) (rejecting a tenth amendment challenge to law conditioning federal highway funds on states' adoption of 21 as minimum drinking age).

8 The floor actions came on amendments offered to the National and Community Service Act of 1989 (S. 1430). The Senate voted 65 to 32 against the measure, 136 CONG. REC. S1798 (daily ed. Feb. 28, 1990) but the House later adopted the amendment by voice vote, 136 CONG. REC. H7548 (daily ed. Sept. 13, 1990). The final version of the Act that emerged from conference committee did not include the volunteer protection provisions.

9 The Volunteer Protection Act of 1989, H.R. 911, 101st Cong., 1st Sess. (1989).

10 The bill would have provided a financial incentive for states to adopt laws relieving volunteers of personal liability for their negligent acts. The most recent version of the bill would have increased the social services block grant by one percent for states that have such laws. As introduced in previous sessions of Congress, the Volunteer Protection Act would have reduced funding for states that did not protect volunteers. *See* 133 CONG. REC. S4724 (daily ed. Apr. 7, 1987) (statement of Sen. Melcher). The bill failed despite the support of the Volunteer Protection Coalition, representing approximately 800 nonprofit organizations. David Hartmann, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 10 BRIDGEPORT L. REV. 63, 68-72 (1989); David R. Jones, *No-Fault Volunteerism*, FOUND. NEWS, Sept./Oct. 1988, at 58.

11 Congressman John Porter, *Volunteers: The Fight for Survival*, 1988 LEADERSHIP 12, 12.

12 The White House, Volunteer Liability Protection Initiatives, Press Release (Dec. 13, 1990) (on file with the *Cornell Law Review*); *see also* DEP'T OF JUSTICE, MODEL STATE VOLUNTEER SERVICE ACT AND COMMENTARY (Dec. 1990) (on file with the *Cornell Law Review*).

13 *See, e.g.*, IOWA CODE ANN. § 613.19 (West Supp. 1990) (liability only for intentional misconduct or knowing violation of law, or for a transaction from which the person derives an improper personal benefit); KY. REV. STAT. ANN. § 411.200 (Baldwin 1989) (liability only for bad faith, willful, or wanton misconduct). Statutes are digested in NONPROFITS' RISK MANAGEMENT & INS. INST., STATE LIABILITY LAWS FOR CHARITABLE ORGANIZATIONS AND VOLUNTEERS (1990) [hereinafter STATE LIABILITY LAWS].

ing payments, increasing certainty, and encouraging settlements,[14] the resultant denial of recovery to negligently injured individuals cannot be justified on any principled basis.[15] Although such a system achieves a rough balance of the affected interests, it is neither the most equitable nor the most efficient alternative. The existing rules reflect the difficulty of balancing multiple factors that are extremely difficult to compare and for which intuitions and visceral reactions have tended to overpower both data and logic.

A more satisfactory system would meet the financial needs of the neediest individuals injured in the course of charitable activity.[16] Doing that without unduly burdening charitable actors requires modifying several aspects of the tort and insurance systems along lines more consistent with the charitable ethos. Tort recovery against charitable organizations and volunteers would become a limited back-up for individuals who would not receive compensation from first-party insurance or goverumental assistance programs.

Such a system would comport better with the driving forces of the charitable orientation, which differ substantially from the paradigm of self-serving behavior that informs tort liability rules for individuals and firms. An adequate arrangement would both implement the charitable sector's obligation to direct its resources toward assistance of society's neediest members and, reciprocally, account for the benefits everyone receives from the main thrust of charitable activities.[17]

Toward these ends, this Article proposes adopting the "Charitable Redress System," which would give charities and volunteers the option of promptly paying for specified categories of loss and

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14 *See* SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, THE PRODUCT LIABILITY REFORM ACT, S. REP. No. 422, 99th Cong., 2d Sess. 1 (1986).

15 *See* Ronald E. Wagner & Jesse M. Reiter, *Damage Caps in Medical Malpractice: Standards of Constitutional Review*, 1987 DET. C.L. REV. 1005.

16 Adjusting the level of damages and incentives for promptly compensating injured parties, rather than raising the standard for laibility, could produce rules that more sensitively balance the objectives of the tort system and cbaritable sector. Scholars' and policy makers' preoccupation with liability standards may blind them to the advantages of a damages approacb. In this regard, Professor Jaffe's observation from a previous era remains apt: "I suggest that the crucial controversy in personal injury torts today is not in the area of liability but of damages. Questions of liability have great doctrinal fascination. Questions of damages—and particularly their magnitude—do not lend themselves so easily to discourse." Louis Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 221 (1953).

17 The proposed arrangement requires a reconceptualization of the relationship between injured and injuring parties along the lines Professor Hutchinson suggests in the following comment: "I do not think that there can be any real improvement [in compensating accident victims] unless there is a crucial sbift in the way people think about themselves as members of a community. Individuals must comprehend that life in a community entails mutual obligations and interdependence." Allan Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755, 756-57 (1985).

thereby foreclosing further liability in tort.[18] Proposals with similar features have been advanced previously,[19] but their application to products liability, medical malpractice, or tort claims generally have left them vulnerable to criticism that they are neither efficient nor just. The special characteristics of charitable actors, however, make the Charitable Redress System less vulnerable to such criticisms.

To provide background for the Charitable Redress System, which is described in Part IV of this Article, Part II presents an overview of the charitable sector with an emphasis on the effects of potential tort liability. Part III establishes the foundation for the Charitable Redress System by testing the assumptions upon which the tort system is based against features of the charitable sector. Finally, in Part V, the constitutionality and some anticipated effects of the Charitable Redress System are considered.

II

THE CHARITABLE SECTOR: VIBRANT YET VULNERABLE

The development of law for the charitable sector has long suffered from limited public understanding of what charitable actors do and how policy alternatives are likely to affect that activity.[20] Only within the past decade has the charitable sector attracted substantial scholarly attention, and the current state of knowledge still lags far behind comprehension of either the business or government sectors.[21]

The dearth of research is especially acute with respect to the principal empirical issue here: the impact of current tort liability rules on charitable organizations and volunteers. This Article draws heavily on research conducted in the course of the Nonprofit Sector Risk & Insurance Project, which examined legal liability and insurance problems throughout the nonprofit sector, with an emphasis on charitable human service providers.[22] Pertinent findings from

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18 Recovery would be limited principally to out-of-pocket and wage loss, less recoveries from collateral sources. *See infra* Part IV, section A, subsection 2, Compensable Damages.

19 For example, in 1985, Representative Moore and seven other House members introduced a bill that would have applied similar rules to claims against Medicare and Medicaid providers. H.R. 3084, 90th Cong., 1st Sess., 131 CONG. REC. H6353 (daily ed. July 25, 1985). Other proposals are mentioned *infra* note 195.

20 *See* Virginia A. Hodgkinson & Richard W. Lyman, *Preface*, in THE FUTURE OF THE NONPROFIT SECTOR xv-xvi (V. Hodgkinson & R. Lyman eds. 1989).

21 Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C.L. REV. 501, 503 (1990); Henry Hansmann, *Economic Theories of Nonprofit Organization*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 27, 27 (Walter W. Powell ed. 1987) [hereinafter THE NONPROFIT SECTOR].

22 The Nonprofit Sector Risk & Insurance Project entailed collecting and analyzing primary materials, such as insurance policies and claims data, as well as conducting over 100 interviews and holding a series of conferences capped by the Nonprofit Sector Risk

that project are presented in this Part, following an overview of the charitable sector. The distinguishing features of the charitable sector that have particular relevance to the formulation of tort rules receive further attention in Part IV, below.

A. Scope and Nature of the Charitable Sector

The charitable sector is large, diverse, and rapidly expanding.[23] It is also ill-defined.[24] The legal concept of "charitable" has proved remarkably protean, evolving over time in response to changing societal conditions. For the present purpose of establishing roughly the dimensions of the charitable sector and the effects of tort liability on its operations, the boundary need not be drawn precisely. Later in the Article, the criteria an organization must possess to qualify as "charitable" for purposes of special tort liability rules will receive more attention.[25]

Section 501(c)(3), the Internal Revenue Code provision that defines charitable organizations that are exempt from ordinary business taxes, provides a useful point of departure for mapping the charitable sector. According to the regulations, that section uses the term "charitable" in "its generally accepted legal sense."[26] To qualify for tax exemption, an organization must, *inter alia*,[27] have a

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and Insurance Forum, which provided input from experts in several disciplines. *See* Kristen A. Goss, *Charities May Be Paying Too Much for Liability Insurance, Experts Warn, but Lack of Data Makes Case Hard to Prove*, CHRON. PHILANTHROPY, Dec. 6, 1988, at I5; Kari Berman, *Improve Risk Management in Non-Profit Sector: Experts*, BUS. INS., Dec. 5, 1988, at 31. Findings from the Nonprofit Sector Risk & Insurance Project are reported in C. TREMPER, *supra* note 2. Based on the information and analyses generated during the project, a task force of representatives from United Way of America, Independent Sector, Council on Foundations, and other coalitions of nonprofit organizations issued recommendations that are reported in RECOMMENDATIONS OF THE NONPROFIT SECTOR RISK AND INSURANCE TASK FORCE (1989).

23 JON VAN TIL, MAPPING THE THIRD SECTOR 78-81 (1989); Gabriel Rudney, *The Scope and Dimensions of Nonprofit Activity*, in THE NONPROFIT SECTOR, *supra* note 21, at 55.

24 One of the most expansive and malleable definitions comes from the Supreme Court in a charitable trust case: "A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man." Ould v. Washington Hosp. for Foundlings, 95 U.S. 303, 311 (1877).

25 *See infra* notes 250-69 and accompanying text.

26 Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 1976). The Internal Revenue Service has endorsed this interpretation consistently since 1959 even though Congress may not have intended to give the word "charitable" in the tax code its ordinary legal meaning. *See* BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 58-64 (5th ed. 1987).

27 To be eligible for tax exemption, an organization must not publicly support or oppose any political candidate and must observe strict limits on lobbying or otherwise attempting to influence legislation. I.R.C §§ 501(c)(3), 501(h) (1989). For a discussion of the history and policies behind these restrictions, see Theodore Garrett, *Federal Tax*

charitable purpose,[28] operate "in harmony with the public interest,"[29] serve a sufficiently broad public,[30] and not allow its resources to "inure to the benefit" of any private person.[31] For federal tax exemption and many other purposes, an organization need not rely on donative financing[32] or primarily serve the poor.[33]

Despite having these distinctive features, charitable organ-

Limitations on Political Activities of Public Interest and Educational Organizations, 59 GEO. L.J. 561 (1971).

Nonprofit organizations wishing to avoid these restrictions may retain their tax-exempt status by operating under I.R.C. § 501(c)(4). Donees, however, will be unable to deduct their contributions to such organizations due to the definition of "charitable contribution" in I.R.C. § 170(c)(2)(D). Whatever the justification for limiting the deductibility of donations to politically active organizations may be, it does not extend to the tort context.

28 I.R.C. § 501(c)(3) (1989). The concept of a charitable purpose receives substantial elaboration in the regulations for section 501(c)(3). *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 1976). Some of the charitable purposes mentioned in section 501(c)(3) are listed *infra* note 42 and accompanying text.

29 In Bob Jones University v. United States, 461 U.S. 574 (1983), the Court ruled that to qualify for section 501(c)(3) exemption, an organization "must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." *Id.* at 592 (footnote omitted). On this basis, the Court denied tax-exempt status to schools with racially discriminatory policies.

30 Rev. Rul. 67-325, 1967-2 C.B. 113; Rev. Rul. 56-403, 1956-2 C.B. 307; *see also* Columbia Park & Recreation Ass'n v. Commissioner, 88 T.C. 1 (1987), *aff'd*, 838 F.2d 465 (4th Cir. 1988). A corollary of this requirement is that a charitable organization cannot exist primarily to serve private interests. Many such organizations may retain their tax-exempt status under section 501(c)(6). Without section 501(c)(3) status, however, contributions to the organization would no longer be deductible, *see* Rev. Rul. 67-325 at 116-17; *Columbia Park*, 88 T.C. at 20 n.43, and would lose access to tax-exempt bonds. *Id.* at 13 n.35.

The requirement of not primarily serving private interests was rigorously enforced in a recent case involving a Republican-financed school for campaign operatives. The Tax Court upheld the IRS denial of exemption on the grounds that the school benefitted primarily private interests and did not serve a charitable class. American Campaign Academy v. Commissioner, 92 T.C. 1053 (1989). Because the reasoning of this opinion clashes with precedents, its effects are impossible to assess meaningfully at this time. *See Republican Campaign School Held Not Tax-Exempt: Much New Law Created*, NONPROFIT COUNS., July 1989, at 1.

31 This "nondistribution constraint" is enshrined in the language of § 501(c)(3) itself, which limits federal income tax exemptions to charitable organizations "no part of the net earnings of which inures to the benefit of any private shareholder or individual." *See* Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (specifying the "nondistribution constraint" as an essential characteristic of every nonprofit organization).

32 *See infra* note 35 and accompanying text (discussing commercial activities of nonprofit organizations).

33 *See* Christopher Jencks, *Who Gives to What?*, in THE NONPROFIT SECTOR, *supra* note 21, at 322. A California court felt compelled to emphasize the difference between the popular and legal meanings of "charity" by stating, "[r]elief of poverty is not a condition of charitable assistance. If the benefit conferred has a sufficiently widespread social value, a charitable purpose exists." Estate of Henderson, 17 Cal. 2d 853, 857, 112 P.2d 605, 607 (1941).

izations are commonly confused with other entities they resemble, and policy making for the sector suffers as a result.[34] Like business firms, charitable organizations may conduct commercial enterprises and earn a profit, provided their principal objective is charitable and the profit is not distributed to private owners.[35] Charitable organizations often have a great deal in common with governmental entities,[36] including shared missions and use of public funds.[37] Unlike the government, however, charitable organizations do not have the power to tax, nor are their leaders responsible to the electorate.

Without the broad consensus necessary for most government action, charitable organizations can redistribute resources from those who are willing to give to a broad class of intended beneficiaries. This redistribution provides more services to the community as a whole than would result from government action alone. Moreover, charitable organizations minister to humankind's spiritual and other psychic needs that government agencies and commercial producers are ill-suited to address. In performing these functions, charitable organizations improve the human condition not only by rendering assistance, but also by cultivating the benevolent and compassionate inclinations of donors and volunteers. Regardless of whether these activities are morally superior to business dealings, the alternative they offer is invaluable for a species that lacks certainty about the nature of the ultimate good. Undertaking charitable activities gives society a hedge against pursuing collective satisfaction only through consumerism and political action.

Part of the popular confusion about the charitable sector may be attributable to the public's failure to distinguish charitable or-

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34 *See* Carroll Estes, Elizabeth Binney & Linda Bergthold, *How the Legitimacy of the Sector Has Eroded*, in THE FUTURE OF THE NONPROFIT SECTOR, *supra* note 20, at 21.

35 *See* Aid to Artisans, Inc. v. Commissioner, 71 T.C. 202, 211 (1978) (profit compatible with tax exemption). The issue of commercial activities of some charitable organizations recently has dominated policy making for the charitable sector. *See* Reid Lifset, *Cash Cows or Sacred Cows: The Politics of the Commercialization Movement*, in THE FUTURE OF THE NONPROFIT SECTOR, *supra* note 20, at 140; *Initial Recommendations by House Ways and Means Oversight Subcommittee Republicans on Unrelated Business Income of Tax-Exempt Organizations*, Daily Tax Rptr., Oct. 27, 1986, at 7-1. The significance of commercial activities for tort rules receives special consideration below. *See infra* notes 270-78 and accompanying text.

36 Although government entities may be considered to be a type of charitable organization for some purposes, they are not treated as sucb in this Article. Because the government can spread its costs broadly across the population by levying taxes, inclusion of government entities in the present analysis would muddy the rationales for separate tort liability rules for the charitable sector.

37 *See* ALAN ABRAMSON & LESTER SALAMON, THE NONPROFIT SECTOR AND THE NEW FEDERAL BUDGET (1986). Dependence on government funding does not of itself convert an entity into a governmental body. If it did, many defense contractors would be nationalized. At one time, the aerospace industry received 90% of its revenue from federal contracts. DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY 322 (1973).

ganizations from nonprofit organizations that are not charitable.[38] Many nonprofits are mutual benefit organizations, for example, social clubs, business leagues, and professional associations.[39] Although nonprofit and perhaps tax-exempt, these organizations operate primarily to aid their members rather than to serve the public, and are not entitled to be treated as charitable organizations.

The imprecise boundaries of the charitable sector and the operation of some organizations without formal recoguition make it difficult to measure the size of the sector. The best estimates come from the Internal Revenue Service ("IRS"), which places the number of tax-exempt charitable organizations between 500,000 and 750,000.[40] Annual operating expenditures for these organizations in 1986 are estimated to have exceeded $300 billion.[41] These organizations are engaged in a great variety of activities, as sug-

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38 At least one charitable organization maven has publicly suggested that "pure" charities may need to purge the "cross-breeds" from their midst if they are to retain either preferential treatment under the law or a high degree of public support. At the 1988 annual meeting of Independent Sector, Henry Hansmann prophesied the split of the nonprofit sector into two distinct groups by the end of the century. One would consist of traditional charities financed in large part by donations; the other would be comprised of "commercial" nonprofit organizations that derive most of their income from charges for goods and services. (Remarks summarized in FIRST ALERT, NONPROFIT WORLD 8 (1988)). Later in 1988, at the Mandel Center's "What is Philanthropy" conference, Hansmann reiterated his contention that charitable organizations must either distinguish themselves clearly from "commercial" nonprofit organizations or expect to lose other benefits just as they lost exemption from certain rules and regulations imposed on for-profit businesses. (An article based on Hansmann's talk has been published as Henry Hansmann, *The Evolving Law of Nonprofit Organizations: Do Current Trends Make Good Policy?*, 39 CASE W. RES. L. REV. 807 (1989)). His previous exegesis establishing the distinction between donative and commercial nonprofit organizations appears in Hansmann, *supra* note 31, at 840-41. For a critique of Hansmann's theories, see Atkinson, *supra* note 21; James Ferris & Elizabeth Grady, *Fading Distinctions Among the Nonprofit, Government, and For-Profit Sectors*, in THE FUTURE OF THE NONPROFIT SECTOR, *supra* note 20, at 123, 136-37.

39 Several states and the Revised Model Nonprofit Corporations Act distinguish between "public benefit" and "mutual benefit" corporations, applying different provisions to each. *See* REVISED MODEL NONPROFIT CORPORATION ACT § 2.02(a)(2) (1988); *see also* Ira Mark Ellman, *On Developing a Law of Nonprofit Corporations*, 1979 ARIZ. ST. L.J. 153, 154-55. For a statute reflecting the approach of the Model Act, although adopted prior to publication of the revised version, see CAL. CORP. CODE §§ 5059-5061 (West Supp. 1988). *See also* Harry Henn & Jeffrey Boyd, *Statutory Trends in the Law of Nonprofit Organizations: California, Here We Come!*, 66 CORNELL L. REV. 1103, 1133-38 (1981) (discussing the merits of the California law cited above).

40 UNITED STATES DEP'T OF TREASURY, INTERNAL REVENUE SERVICE, ANNUAL REPORT 61, Table 20 (1987). The 422,103 organizations that are cataloged by the Internal Revenue Service as exempt under I.R.C. § 501(c)(3) for being "charitable" organizations do not include churches and certain related religious organizations that are not required to file for exemption, nor do they include innumerable small organizations that operate without formal approval by the IRS. For all tax-exempt organizations, the same table of the Annual Report reports a total of 978,676.

41 INDEPENDENT SECTOR, DIMENSIONS OF THE INDEPENDENT SECTOR, Table 2.2 (2d ed. 1986, 1988 update).

gested by the categories enumerated in section 501(c)(3), including "religious," "scientific," "literary," and "educational."[42]

Legions of volunteers work for charitable organizations. According to one nationwide survey, approximately half of the population renders volunteer services each year.[43] The same survey estimates annual labor in formal volunteer assignments at nearly fifteen billion hours, which is the equivalent of eight million full-time employees with an assessed value of $150 billion.[44] Without these volunteers, the ability of charitable organizations to perform services free or at reduced cost would be substantially diminished.

B. General Liability and Assorted Exceptions

Tort standards for charitable organizations and volunteers have been in flux throughout the past half century. At one time the doctrine of charitable immunity provided charitable organizations with nearly complete protection from legal liability.[45] Although almost every state recognized charitable immunity at the dawn of the twentieth century, the doctrine was never very secure. Charitable immunity was imported into this country on the strength of an English case that had previously been overruled[46] and lacked clearly articulated justifications. Thus, most courts needed little prodding to riddle the doctrine with exceptions and eventually abolish it.[47]

Much of the prodding to end charitable immunity came as part

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42 I.R.C. § 501(c)(3) (1989). Section 501(c)(3) also lists "testing for public safety, . . . foster[ing] national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals." The word "charitable" appears on this list of purposes as a distinct category for organizations that conduct appropriate types of activities that do not fall within any of the other categories. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 1976).

43 INDEPENDENT SECTOR, GIVING AND VOLUNTEERING IN THE UNITED STATES 9 (1988). The survey results do not separately identify the portion of this volunteer labor rendered in the service of governmental entities rather than charitable organizations.

44 *Id.* at 8; *cf.* Paul L. Menchik & Burton A. Weisbrod, *Volunteer Labor Supply*, 32 J. PUB. ECON. 159 (1987) (stating somewhat lower numbers, but acknowledging the existence of higher estimates).

45 *See* sources cited *supra* note 1.

46 In McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529 (1886), the court relied on the English case of Holliday v. The Vestry of the Parish of St. Leonard, 11 C.B. (N.S.) 192, 142 Eng. Rep. 769 (Common Pleas, 1861), to deny recovery against a charitable hospital. Other American courts followed *McDonald* even though English courts had overruled *Holliday* several years before *McDonald* was decided. Comment, *The Immunity of Charitable Institutions From Tort Liability*, 11 BAYLOR L. REV. 86, 88-89 (1959) (authored by John R. Feather).

47 *See, e.g.*, Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241, 247 (1951) (holding charitable corporations liable for their tortious conduct); Harris v. YWCA of Terre Haute, 250 Ind. 491, 497, 237 N.E.2d 242, 245 (1968) (in the court's view, the doctrine of charitable immunity "was ill conceived and has certainly outlived any usefulness it may have had at one time"); *see also* Edith L. Fisch, *Charitable Liability for Tort*, 10 VILL. L. REV.

of a broader movement to eliminate barriers to tort recovery.[48] Compensating victims became paramount.[49] In the interest of spreading losses and internalizing costs, charitable immunity went the way of a host of doctrines that had limited businesses' liability for whatever harm they caused.[50] Judges almost uniformly assumed that any threat liability might once have posed to the vitality of charitable activities disappeared with the advent of inexpensive liability insurance in the early part of this century.[51]

Subsequent increases in the cost of insurance and the periodic unavailability of liability coverage, together with changes in the tort system, have engendered a charitable immunity counter-trend.[52] During the 1980s, many states created new limitations on the liability of charitable actors.[53] Almost every state now protects some volunteers, usually directors and officers, from liability for negligent acts, while still allowing recovery for more flagrant wrongdoing.[54] A

71, 81-85 (1964) (noting various circumstances under which charitable immunity did not apply).

48 *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 6-8 (1988).

49 This theme is made clear in one of the earliest cases to eliminate charitable immunity, Geiger v. Simpson Methodist-Episcopal Church of Minneapolis, 174 Minn. 389, 395-96, 219 N.W. 463, 465-66 (1928). It remains dominant through one of the most recent cases with the same result, Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 487, 234 S.E.2d 873, 876 (1977).

50 *See generally* Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring opinion emphasizing risk spreading as a justification for imposing a strict liability standard on manufacturers); Richard A. Epstein, *Products Liability As an Insurance Market*, 14 J. LEGAL STUD. 645 (1985) (discussing the tort system from an insurance perspective); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (discussing the allocation of losses to business and consumers).

The implications of risk spreading and cost internalization for the liability of charitable organizations are discussed in greater detail below. *See infra* notes 121-35 and accompanying text.

51 In President and Directors of Georgetown College v. Hughes, Justice Rutledge dismissed concern about saving insurance premiums burdening a hospital's budget with the assertion that "[a]dding beneficiaries cannot greatly increase the risk or the premium. This slight additional expense cannot have the consequences so frequently feared in judicial circles, but so little realized in experience." 130 F.2d 810, 828 (D.C. Cir. 1942).

52 *See infra* notes 54-59 and accompanying text. Not all courts recognize a serious insurance problem. As late as 1981, one court wrote that the availability of insurance vitiated concern about the economic impact of liability. Fitzer v. Greater Greenville, S. C. YMCA, 277 S.C. 1, 4, 282 S.E.2d 230, 231 (1981).

53 *See* Brenda Trolin, *Legislatures Awaken to Charitable Organizations Hit by Liability Insurance Crisis*, 6 PREVENTIVE L. REP. 12 (1987).

54 *See, e.g.*, MINN. STAT. ANN. § 317.201 (West Supp. 1991); TENN. CODE ANN. § 48-58-601 (Supp. 1989); WASH. REV. CODE § 4.24.264 (1988). Some of the statutes have been narrowly tailored to limit liability only in circumstances similar to a well-publicized case that prompted the legislation. *See, e.g.*, MASS. GEN. L. ch. 231, § 85V (Cum. Supp. 1989) (nonprofit sports programs immune from some types of claims); 42 PA. CONS. STAT. ANN. § 8332.1 (Purdon Supp. 1990) (recovery against volunteer coaches limited to

few states predicate protection of volunteers on the sponsoring organization maintaining adequate liability insurance or meeting some other standard.[55] Some states retain limited versions of traditional charitable immunity.[56] Others impose damage caps on recoveries against charitable organizations,[57] limit recovery to the amount of available insurance,[58] or protect some assets of charitable organizations from judgment.[59]

The tremendous diversity of state policies governing tort liability of charitable actors suggests the difficulty of reconciling the competing interests. Recognizing that neither full liability nor complete immunity is wholly satisfactory, states are experimenting with myriad arrangements to achieve an appropriate balance between the two.

C. The Impact of Tort Liability on Charitable Organizations and Volunteers

1. *Claims Experience*

Media reports of claims against charitable organizations and volunteers strongly influence public perceptions about the riskiness of charitable activity and the need for modifying liability rules. During the past decade, media coverage contributed to the perception that injured parties frequently won judgments against charitable organizations and volunteers.[60] The spate of news stories also fos-

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instances in which conduct "falls substantially below the standards generally practiced and accepted in like circumstances"); WYO. STAT. § 1-1-118 (1988) (nonprofit organizations that sponsor rodeos liable only for willful, wanton, or reckless misconduct). Volunteer protection statutes are digested in STATE LIABILITY LAWS, *supra* note 13.

55 *See, e.g.*, KAN. STAT. ANN. § 60-3601 (1988); MD. CTS. & JUD. PROC. CODE ANN. § 5-312(b) (Supp. 1989); TEX. CIV. PRAC. & REM. CODE ANN. § 84.007(g) (Vernon Supp. 1989).

56 The common law of charitable immunity survives in Arkansas for organizations that are "created and maintained *exclusively for charity*." Williams v. Jefferson Hosp. Ass'n, 246 Ark. 1231, 1235, 442 S.W.2d 243, 244 (1969) (emphasis in original). In other states, certain categories of charitable organizations are not liable for negligently caused injury to a beneficiary of the organization. *See, e.g.*, Radosevic v. Virginia Intermont College, 633 F. Supp. 1084 (W.D. Va. 1986) (applying Virginia law); Autry v. Roebuck Park Baptist Church, 285 Ala. 76, 229 So. 2d 469 (1969); N.J. STAT. ANN. § 2A:53A-7 (West 1987).

57 *See, e.g.*, MASS. GEN. L. ch. 231, § 85K (West 1988) ($20,000) (recently upheld in English v. New England Medical Center, Inc., 405 Mass. 423, 541 N.E.2d 329 (1989)); TEX. CIV. PRAC. & REM. CODE ANN. § 84.005 (Vernon Supp. 1990) ($500,000 per person, $1,000,000 per incident, with caveats).

58 *See, e.g.*, Eliason v. Funk, 233 Md. 351, 196 A.2d 887 (1964); ME. REV. STAT. ANN. tit. 14, § 158 (1980).

59 *See, e.g.*, Mack v. Big Bethel A.M.E. Church, Inc., 125 Ga. App. 713, 188 S.E.2d 915 (1972) (impliedly holding that "charitable" assets are judgment-proof); Hammond Post, Am. Legion v. Willis, 179 Tenn. 226, 165 S.W.2d 78 (1942) (holding that no judgment is recoverable out of charitable assets).

60 *See* sources cited *supra* note 5.

tered sympathy for the plight of volunteers and popular charities faced with lawsuits demanding millions of dollars.

This media version of reality was especially powerful because no one challenged it with reasonably accurate and complete data about claims, settlements, and judgments. The best potential source of such data is the Insurance Services Office ("ISO"), which systematically collects and analyzes general liability claims information on behalf of the domestic insurance industry.[61] Because the ISO, like most insurance carriers, does not systematically differentiate between claims data for charitable organizations and data for the business community, separate analysis is impossible.[62]

To assess the actual frequency and magnitude of claims against charitable organizations, several interested parties have surveyed charitable organizations about their tort liability.[63] Methodological limitations of these surveys restrict the inferences that should be drawn from their data,[64] but collectively these surveys suggest that

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61 Even without the assistance of the ISO, estimates might be generated from the databases of the half dozen insurance companies that write the bulk of policies for charitable organizations. Because insurance companies derive a competitive advantage from good data on their policyholders' claims experiences, however, no insurer will unilaterally grant access to its data.

62 The class plans many insurance underwriters use do not systematically categorize a policyholder as charitable. The basic element of a class plan is a taxonomy of entities with rates assigned to each. Only rarely are ISO categories constituted entirely of charitable organizations. For a thorough discussion of class plans, see ROBERT HOLSTOM, UNDERWRITING PRINCIPLES AND PRACTICE 137-51, 164 (1973).

Prompted by a New York law that requires insurers admitted in that state to report data separately for nonprofit organizations, the ISO is in the process of revising its Commercial Lines Manual. The new version subdivides approximately 70 categories to differentiate between for-profit and nonprofit policyholders. The result will be better data on the losses of charitable organizations, but still the data will be inexact because charitable organizations will continue to be combined with other nonprofits and governmental entities. INSURANCE SERVS. OFFICE, SIMPLIFIED COMMERCIAL LINES MANUAL (draft 1990).

63 Among the most thorough, well-conducted, and widely cited of these surveys are AMERICAN SOC'Y OF ASS'N EXECUTIVES, THE LIABILITY CRISIS AND THE USE OF VOLUNTEERS BY NON-PROFIT ASSOCIATIONS 8 (Jan. 1988) [hereinafter THE LIABILITY CRISIS]; and PEAT, MARWICK, MITCHELL & COMPANY, DIRECTORS' AND OFFICERS' LIABILITY: A CRISIS IN THE MAKING: A STUDY OF NATIONAL NOT-FOR-PROFIT VOLUNTARY ORGANIZATIONS (1987) [hereinafter A CRISIS IN THE MAKING]. A dozen surveys, including the two cited in this note, are summarized in C. TREMPER, *supra* note 2, at 166-77.

64 The surveys generally were plagued by small sample sizes and high nonresponse rates. Ability to generalize results from the two most methodologically sound surveys is limited because their samples consisted primarily of executives serving large, relatively well-funded, and sophisticated organizations. In addition, one of those surveys included many trade associations that are not charitable.

One study of actual claims information from insurance companies provides an additional reason for skepticism in reviewing the survey results. The study by the Texas State Board of Insurance, which has significant methodological limitations of its own, is based on all insurance claims in Texas during a four-month period in 1983. TEXAS LIABILITY INSURANCE CLOSED CLAIM SURVEY (Feb. 1987). During those four months, 10

charitable organizations suffer below average losses for the coverages examined.[65] For example, a national survey of 153 executives of large nonprofit organizations found that only three lawsuits had resulted from a board or executive action.[66] Two of those claims were settled and the other successfully defended.[67] The results of a directors and officers insurance program administered by Huntington T. Block insurance brokerage for 150 to 200 foundations were similar. During the five years preceding 1988 (which included the worst of the hard insurance market[68] when directors and officers insurance premiums soared) only two claims were filed, neither of which resulted in a payment to the claimant.[69] By contrast, 759 of the 1708 for-profit businesses the Wyatt Company questioned for its 1987 directors and officers liability survey had been sued in the preceding five years.[70] Over ten percent of the companies (179 of 1708) had at least one claim during 1987 alone.

Although claims against volunteers in their individual capacities appear to be rare,[71] hard data to support this conclusion are not readily available. An inference may be drawn, however, from the pricing history of the CIMA Company's volunteer insurance program. Between 1978 and 1988, the premium rate for CIMA's Volunteer Insurance Protection policy dropped from $5.00 per volunteer to 50 cents per volunteer.[72] Such a low premium is possible only if claims against volunteers are uncommon and inexpensive.

2. *Susceptibility to Claims*

The demise of charitable immunity has left charitable organizations more susceptible to lawsuits than the level of claims against

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claims were filed against nonprofit organizations, resulting in payments of $4,646,885. The presence or absence of a single large claim in a small survey can wildly alter the results.

65 A number of feasibility studies undertaken in the process of forming purchasing groups or risk pooling mechanisms evidently reach similar conclusions (otherwise the purchasing groups or risk pooling mechanisms would not have been created). The results of those studies, like insurance company claims data, are not available to the public.

66 A CRISIS IN THE MAKING, *supra* note 63, at 6.

67 *Id.*

68 A hard or tight insurance market is one in which premiums rise while the availability of coverage simultaneously diminishes. *See, e.g.*, Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. ON REG. 455 (1988).

69 *Who Needs D&O Insurance?*, FOUND. NEWS, July/Aug. 1988, at 52.

70 Reported in Mark A. Hofmann, *D&O Costs Up, Claims Frequency Increasing: Study*, BUS. INS., Dec. 19, 1988, at 1, 64-65.

71 *Volunteer Protection Act, 1987: Hearing on S. 929 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 11 (1988) [hereinafter *Hearing on S. 929*].

72 Statement of Marty Laine, Nonprofit Sector Risk and Insurance Forum, in Chicago (Nov. 11, 1988).

them to date suggests. Several factors that discourage suits against charitable organizations may account for this discrepancy between susceptibility to and frequency of suits. Many small charitable organizations that receive funding on an annual basis and have neither cash reserves nor other appreciable assets are effectively judgment-proof. Public attitudes about the propriety of suing a charitable organization or volunteer may be even more deterring. Empirical studies of litigiousness have found that numerous considerations, including the victim's subjective appraisal of the potential defendant's worthiness, influence the decision to sue.[73] Although research is insufficient to prove this surmise, observation of societal customs suggests that an individual who receives free services may be less likely to sue than someone who has paid for the same services. Furthermore, nonbeneficiaries who recognize the value of charitable activity and the sacrifices it entails may also be less likely to sue a charitable organization than they would a business or the government.[74] When charitable organizations and volunteers have been sued, at least some judges and juries have been disinclined to find liability or award substantial damages.[75]

While these factors tend to reduce the number of suits against charitable organizations, they do not foreclose the filing of a claim. Their effects, therefore, are far different from legally binding rules. Consequently, charitable organizations must act as any business susceptible to suit would. This often means purchasing liability insurance, and insurance companies base premiums in part on worst case scenarios.[76] The potential for large claims along with an onslaught

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73 *See, e.g.*, Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701 (1977); Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC'Y REV. 655 (1981); Neil Vidmar & Regina A. Schuller, *Individual Differences and the Pursuit of Legal Rights: A Preliminary Inquiry*, 11 LAW & HUM. BEHAV. 299 (1987).

74 On the consequences of being nonprofit, let alone charitable, Daniel Fessler conjectures, "[t]he public reacts with a disarmed sense of generosity in the face of such a label." Daniel W. Fessler, *Codification and the Nonprofit Corporation: The Philosophical Choices, Pragmatic Problems, and Drafting Difficulties Encountered in the Formulation of a New Alaska Code*, 33 MERCER L. REV. 543, 547 (1982); *see also* Hansmann, *supra* note 31, at 896-97. *But see* Steven E. Permut, *Consumer Perceptions of Nonprofit Enterprise: A Comment on Hansmann*, 90 YALE L.J. 1623, 1626-30 (1981) (reporting survey results that consumers generally do not distinguish sharply between for-profit and nonprofit firms).

75 *See, e.g.*, Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell, 183 Ga. App. 496, 497, 359 S.E.2d 241, 242 (1987) (screening procedure organization used "came as close as is practicable for a volunteer organization" to screen out potential volunteers predisposed to sexually abuse children). Courts have been reluctant to impose financial liability on volunteers despite findings of wrongdoing. Even in *Stern v. Lucy Webb Hayes National Training School*, the landmark case that sigualled a nonprofit organization's board member's susceptibility to suit, the negligent directors were not ordered to pay. 381 F. Supp. 1003, 1020-21 (D.D.C. 1974).

76 ROBERT I. MEHR, FUNDAMENTALS OF INSURANCE (2d ed. 1986).

of suits is a prime justification for high liability insurance premiums. The cost of insurance varies directly with uncertainty because insurers demand a higher rate of return for accepting greater risk.[77] When claims become too unpredictable, insurers may withdraw from the market altogether.[78]

Many charitable activities pose risks that insurers are reluctant to cover. Child care providers and other organizations serving minors are especially difficult to insure because individuals who suffer harm as young children may file suit up until their twenty-first birthday in some states.[79] Because charitable organizations usually have no investor capital to lose in tort claims against them, insurers worry that those organizations may lack sufficient incentive to exercise due care and are therefore reluctant to provide coverage.[80]

Aside from risks attendant to serving certain populations and providing certain services, charitable organizations present one additional exposure that is almost unknown among for-profit firms—the common use of volunteers. Insurers may assume that volunteers pose greater liability risks, despite the absence of confirmatory data. Consequently, general liability insurance policies typically include employees but not volunteers.[81]

Charitable organizations' lack of insurance for volunteers leaves many volunteers personally liable for judgments against them. This exposure is especially problematic for volunteers who do not have personal coverage. Even insured volunteers may find that their standard personal policies do not cover some actions undertaken as a volunteer.[82] Personal umbrella policies and the liability provisions

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77 Although the law of large numbers offsets the effect of high variability, with an insurance pool of any given size, greater uncertainty necessitates higher premiums. For a discussion of the economics of the insurance market, see R. MEHR, *supra* note 76.

78 For examples, see *10 Work Comp Insurers Seek to Withdraw from Maine Market*, BUS. INS., Sept. 21, 1987, at 1, 2; Michael Bradford, *Two Insurers Drop 7,500 Florida Doctors*, BUS. INS., May, 11, 1987, at 79.

79 *See, e.g.*, CAL. CIV. PROC. CODE § 352 (West Supp. 1988); MINN. STAT. ANN. § 541.15 (West 1988). This "long tail" may result in claims being filed under a legal system far different from the one that operated at the time the policy was written. One method insurers have adopted for such situations is to offer coverage on a "claims-made" basis, which effectively limits their long-term exposure. The effect of a "claims-made" policy from the policyholder's perspective is to increase the likelihood that a delayed claim will not be covered. Stephen Tarnoff, *Regulators Question Claims-Made Form*, BUS. INS., Aug. 5, 1985, at 2; Comment, *"Claims-Made" Liability Insurance: Closing the Gaps with Retroactive Coverage*, 60 TEMP. L.Q. 165 (1987) (authored by Carolyn M. France).

80 BYRON STONE & CAROL NORTH, RISK MANAGEMENT AND INSURANCE FOR NONPROFIT MANAGERS 24-26 (1988).

81 *See* TERRY S. CHAPMAN, MARY L. LAI & ELMER L. STEINBOCK, AM I COVERED FOR . . . ? 115-16 (1984); B. STONE & C. NORTH, *supra* note 80, at 100; Comment, *Organizations' Liability for Torts of Volunteers*, 133 U. PA. L. REV. 1433, 1446-47 (1985) (authored by Jeffrey D. Kahn).

82 Donald S. Malecki, *Non-profit D&O Liability Policy Provides Important Coverage: Per-*

of ordinary homeowners' and renters' policies are limited to bodily injury and property damage. They do not apply, for example, to a suit against a board member for wrongful termination of an organization's executive director. Personal automobile policies do not cover the commercial transportation of others, which is how an insurer may characterize giving rides to an organization's clients on a regular basis.[83] Especially when serving newly formed or poorly financed organizations, which usually cannot obtain adequate insurance, volunteers may place their personal assets at risk.

3. *Program Effects*

The possibility of legal liability can radically alter charitable organizations' activities.[84] The risk of legal liability may substantially decrease the resolve or financial ability of a charitable organization to continue operating, particularly if the organization offers free or reduced-cost services. Examples include the decisions of some Parent Teacher Associations to end their sponsorship of Boy Scout troops out of fear that sponsors might be held liable for child abuse by local scout leaders,[85] and some youth programs' discontinuation of physically challenging activities.[86]

Several nonprofit associations have surveyed charitable organizations to assess the extent to which concern about liability reduces charitable and volunteer services.[87] Although none of these surveys is sufficient by itself to fully illuminate the matter,[88] several corroborate the logical inference that potential liability reduces charitable

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sonal Umbrella Is a Poor Substitute, ROUGH NOTES, Aug. 1986, at 15; Charles Robert Tremper, *Are Nonprofit Board Members Indecently Exposed?* (Book Review), 22 U.S.F. L. REV. 857, 869-70 (1988).

83 The standard Personal Auto Policy from the ISO excludes liability arising from "ownership or operation of a vehicle while it is being used to carry persons or property for a fee." ALLIANCE OF AM. INSURERS, POLICY KIT 1988 (reprinting 1985 ISO form). This clause could be interpreted to apply if a volunteer is reimbursed for expenses. If the injured party was a passenger in the volunteer's vehicle, insurance coverage will be limited to medical payments rather than the full liability coverage.

84 *See* Benningfield, *supra* note 5; Comment, *Charity Is No Defense: The Impact of the Insurance Crisis on Nonprofit Organizations and an Examination of Alternative Insurance Mechanisms*, 22 U.S.F. L. REV. 599, 604-09 (1988) (authored by Michael Pierce Singsen).

One justification for tort liability is to deter activities that produce more harm than good. Whether the imposition of tort liability on charitable actors achieves that objective is considered below. *See infra* notes 121-37 and accompanying text.

85 Veronica T. Jennings, *PTAs Wary of Scout Sponsorships*, Wash. Post, Apr. 2, 1989, at B1, col. 1.

86 *Insurance Increase Forces YMCA To Drop Youth Minibike Program*, Christian Science Monitor, Aug. 14, 1986, at 5, col. 3; Kenneth Reich, *Youth Agencies Hit Hard by Soaring Insurance Costs*, L.A. Times, July 19, 1986, Part II, at 1, col. 1.

87 For a list of these surveys, see *supra* note 63 and accompanying text.

88 The surveys targeted large organizations, which typically have insurance or sufficient resources to minimize the likelihood that an injured party would seek redress against a volunteer. Other methodological limitations are discussed in note 64, *supra*.

activity.[89] Although few organizations have abandoned their missions solely because of liability concerns, and even though the supply of volunteers remains high, exposure to liability can distort decisions regarding which services to provide and how to deliver those services.[90]

To protect their organizations' assets from potential loss in a lawsuit, charitable organization administrators could, but generally do not, use a number of shielding techniques common to the business world. For example, well-financed charitable organizations could create thinly capitalized subsidiaries to offer high risk services and thus shield the assets of the parent.[91] Despite their legality and popularity in the commercial sector,[92] such strategies of financial in-

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89 *See* surveys cited *supra* note 63.

90 In large part, the tort system is designed to promote this very process of weighing the benefits of action against the potential for liability. The tort system should not deter beneficial activity, however, by imposing sanctions that exceed the rewards that may come from conducting the activity. In this respect, charitable organizations and volunteers are especially vulnerable. An organization may have little choice but to forgo the activity if forced to bear full liability costs without the prospect of generating revenue from an activity.

91 A thimly capitalized subsidiary is a corporation with minimal assets that is wholly owned by a parent corporation that may have substantial assets. The two corporations may have identical boards, and the subsidiary may enter into leases and other arrangements with the parent that allow the subsidiary to use the parent's resources. From a risk management perspective, the chief advantage of this arrangement is that it ordinarily insulates the parent organization from liability for claims against the incorporated subsidiary. *See* HARRY HENN & JOHN ALEXANDER, LAW OF CORPORATIONS § 146, at 347 (3d ed. 1983).

Although a third party that brings suit against a subsidiary usually cannot recover damages from the parent, some cases have permitted injured parties to "pierce the corporate veil." *E.g.*, Sisco-Hamilton Co. v. Lennon, 240 F.2d 68 (7th Cir. 1957); Robinson v. Chase Maintenance Corp., 20 Misc. 2d 90, 190 N.Y.S.2d 773 (N.Y. Sup. Ct. 1959); Annotation, *Liability of Corporation for Torts of Subsidiary*, 7 A.L.R. 3D 1343 (1966). In most states, undercapitalization is not a sufficient reason to disregard the parent/subsidiary distinction, although it is a highly relevant factor. *See* DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681, 685 (4th Cir. 1976); *see also* Anderson v. Abbott, 321 U.S. 349, 362, *reh'g denied*, 321 U.S. 804 (1944) (stockholders of bank holding company held liable for assessment on subsidiary bank). *See generally* Harvey Gelb, *Piercing the Corporate Veil—The Capitalization Factor*, 59 CHI.-KENT L. REV. 1, 4-18 (1982) (stating proposition that a better inquiry may be whether level of assets is adequate). However, even when the subsidiary is formed for the express purpose of protecting the parent from liability, the parent ordinarily is not subject to liability. *See* Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979); Arnold v. Phillips, 117 F.2d 497, 502 (5th Cir.), *cert. denied*, 313 U.S. 583 (1941). *But see* Dixie Coal Mining & Mfg. Co. v. Williams, 221 Ala. 331, 128 So. 799 (1930); Goldberg v. Engelberg, 34 Cal. App. 2d 10, 92 P.2d 935 (1939) (both containing disapproving dicta). Exactly which factors will lead a court to pierce the corporate veil differs from state to state. Generally, disregard of corporate formalities is an essential element. *See* David Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371 (1981); Roger Meiners, James Mofsky & Robert Tollison, *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351 (1979).

92 *See* Comment, *Should Shareholders Be Personally Liable for the Torts of Their Corporations?*, 76 YALE L.J. 1190 (1967).

sulation are not common among charitable organizations.[93] Liability limiting strategies acceptable in the business sector may imperil the "good citizen" image that entitles charitable organizations to the high regard and special treatment they generally enjoy. Addressing the liability issue directly through a legislative determination of whether society's interests are best served by holding charitable actors fully liable for harm is a preferable alternative.

By far the most pervasive effect of tort liability on charitable organizations is to cause them to buy liability insurance. Very few charitable organizations other than hospitals and universities have such substantial reserves that they can self-insure in the way that many businesses and governmental entities do. Moreover, even if the managers of charitable organizations are not inclined to purchase liability insurance, their organizations might need coverage to qualify for state licensure or to be eligible for funding from foundations or government agencies.[94] These factors create a substantial demand for liability insurance, regardless of price. Accordingly, full understanding of how potential liability affects charitable activity requires appreciation of the role of liability insurance.

Estimating the total cost of liability insurance for the charitable sector is extremely difficult because there are no direct measures of aggregate charitable organization expenditures for any of the relevant budget categories. A rough approximation can be obtained using available, albeit imperfect, data for operating expenses and the ratio of insurance expenses to total expenses. Operating expenses for the independent sector,[95] exclusive of health service providers, totalled approximately one hundred billion dollars in 1986.[96] Esti-

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93 In Arkansas and New Mexico, repositioning a nonprofit corporation's assets to insulate them from judgment may nullify statutory limitations on the liability of directors and officers. ARK. STAT. ANN. §§ 16-120-101 to -104 (Supp. 1989); N.M. STAT. ANN. § 53-8-25.3 (Supp. 1989). The tactic is sometimes used, though, if the subsidiary is expected to generate a profit. *See* Priv. Ltr. Ruls. 87-06012 (Oct. 31, 1986); 87-16004 (Jan. 1, 1987); Carolyn Chiechi, *Exempt Parent Can Have For-Profit Subsidiary*, 67 J. TAX. 362 (1987).

94 These requirements may reflect a societal judgment that charitable organizations should be financially responsible for their tortious activity. However, the driving force behind funders' insistence that recipients be adequately insured probably is to provide a source of recovery for claims against the organization so that injured parties will not seek redress against the funders.

95 The term "independent sector" has no precise definition. As used in the source for the statistics presented here, the independent sector category is comprised almost exclusively of organizations exempt from federal income tax as charities (*i.e.*, qualifying under I.R.C. § 501(c)(3)). *See* VIRGINIA HODGKINSON & MURRAY WEITZMAN, DIMENSIONS OF THE INDEPENDENT SECTOR 1 (3d ed. 1989).

96 *Id.* at 39. The estimate for the health services sector is $104.7 billion. Because the risks of medical service providers differ enormously from the risks of other charitable organizations, the ratio of insurance premiums to total expenditures for the former category would not be an accurate estimate for the latter.

mating an average insurance expense for property and liability coverages (other than motor vehicle) between two and three percent of total operating expenses,[97] the insurance cost may be calculated between two and three billion dollars.[98]

During the hard insurance market of the mid-1980s,[99] many charitable organizations could not obtain adequate coverage.[100] Although total unavailability of insurance was uncommon, the specter of over one thousand nurse-midwives losing their group policy[101] and over one in three child care centers having liability insurance cancelled or not renewed,[102] together with the precipi-

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97 This estimate is an average of ratios developed from a sample of United Way agencies and other sources available to the author. The United Way sample includes data for 200 organizations in five states. Total annual spending for those organizations in the 1987-1988 period was $250 million, with $5.6 million devoted to property and liability coverage. Because some organizations purchased package policies and others did not report separate figures for property and liability insurance, the amount spent for liability insurance alone could not be estimated.

98 Whatever amount charitable organizations pay for liability insurance, it is probably more than they should be paying for the coverage they receive and probably far more than they would pay if the need for insurance were reduced by adopting the proposal offered in this Article. Charitable organizations are likely to pay too much for their insurance because insurers do not routinely distinguish between charitable organizations and other entities. *See supra* note 62. As a result, developments affecting only for-profit enterprises influence insurance premiums for charitable organizations included in the same rating category.

99 Innumerable media accounts of the insurance "crisis" are available. *See, e.g.*, George Church, *Sorry, Your Policy Is Canceled*, TIME, Mar. 24, 1986, at 16; *Costlier Insurance Said to Cover Less Liability*, N.Y. Times, Oct. 4, 1987, at L36. Among the most comprehensive governmental analyses are the two publications from the United States Attorney General's Tort Policy Working Group: REPORT ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986) [hereinafter THE CURRENT CRISIS] and AN UPDATE ON THE LIABILITY CRISIS (Mar. 1987) (both summarized in *An Update on the Liability Crisis*, in 2 ISSUES IN INSURANCE 425 (Everett D. Randall 4th ed. 1987)); and, from NEW YORK, INSURING OUR FUTURE: REPORT OF THE GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE (popularly known as the JONES REPORT) (1986).

Blame for the hard market has been placed upon three sets of factors: 1) collusion, 2) tort law, and 3) cycles. For a concise summary of the theories, see Kenneth Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399 (1987).

100 C. TREMPER, *supra* note 2, at 7-8; Comment, *supra* note 84, at 599-609; Bruce Keppell, *Small Nonprofit Agencies Tell of Insurance Dilemma*, L.A. Times, May 14, 1987, Part IV, at 3, col. 2.

101 *Liability Insurance Availability (Part 3): Hearings Before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce*, 99th Cong., 2d Sess. 432-35 (1986) (statement of Karen Ehrnman); *How Nurse-Midwives Regained Their Insurance Protection*, 63 J. AM. INS. 27 (3d Qtr. 1987); Jerry Geisel, *Midwives Find Liability Cover*, BUS. INS., July 28, 1986, at 3, 27.

102 NATIONAL ASS'N FOR THE EDUC. OF YOUNG CHILDREN, FINAL REPORT OF THE CHILD CARE LIABILITY INSURANCE SURVEY 3 (1986); Margaret LeRoux, *Liability Insurers Are Abandoning Day Care Centers Across the U.S.*, BUS. INS., June 10, 1985, at 2, 37. Although this estimate probably exceeds the actual figure because of self-selection bias and because it includes both for-profit and nonprofit entities, it does suggest the difficulties many organizations faced in the mid-1980s.

tous increase in premiums,[103] fostered a pandemic sense of vulnerability. Many of the insurance policies that remained available featured sharply increased premiums, lower limits, higher deductibles, exclusions of more types of incidents, and coverage on a claims-made rather than occurrence basis.[104] These changes in insurance coverage increase the risk that lawsuits pose to charitable organizations' financial assets.

Subsequent to the insurance crunch of the mid-1980s, premiums dropped and availability of insurance expanded. The cyclicality of such shifts in price and availability in commercial insurance markets diminishes the utility of insurance in stabilizing the volatility of tort liability.[105] The disruptive effects of these insurance cycles are much greater for charitable organizations than for businesses. For charitable organizations with strictly limited funds and rigid budgeting procedures, contingency planning is especially difficult. A request for operating funds to cover insurance costs often entails submission of a proposal more than a year before the premium comes due. In addition, the government and foundations usually allocate funds by expense category with little flexibility to shift money among categories to pay for increased insurance expenses. Furthermore, for charitable organizations, the strategy of passing

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103 Numerous surveys have found large increases in insurance premiums charged nonprofit organizations during the mid-1980s. The American Society of Association Executives' survey of directors and officers insurance for its members reported an average increase of 155 percent between 1984 and 1987. THE LIABILITY CRISIS, *supra* note 63, at 8. In a survey by Independent Sector, 25 percent of the respondents reported an increase of 300 percent or more in their annual premiums. A CRISIS IN THE MAKING, *supra* note 63, at 5. Family services providers, not all of whom were charitable organizations, experienced an average increase of 132 percent in professional liability premiums from 1985 to 1987. COUNCIL ON ACCREDITATION OF SERVICES FOR FAMILIES AND CHILDREN, INC., COUNCIL ON ACCREDITATION SURVEY OF ACCREDITED AGENCIES (Apr. 1988).

104 *See* THE CURRENT CRISIS, *supra* note 99, at 53-54. Occurrence policies cover all incidents during the policy period regardless of when the claim is filed. A claims-made policy covers an incident that occurs while the policy is in force only if the claim is filed (or with some policies, if the incident is reported) during the policy period or within the extended period covered by a special extension to the policy.

105 Although the insurance market dislocations of the mid-1980s were a new experience for most charitable organizations, they were not unusual for the insurance industry generally. They were preceded by a products liability insurance "crisis" in the late 1970s; a medical malpractice insurance "crisis" in the mid-1970s; and an automobile liability insurance "crisis" in the late-1960s. The pattern of soft insurance markets (low price, ready availability) being replaced by hard insurance markets (high price, restricted availability) that in turn give way to soft insurance markets is a familiar feature of commercial liability insurance and will likely recur. *See* J. David Cummins & J. Francois Outreville, *An International Analysis of Underwriting Cycles in Property-Liability Insurance*, 54 J. RISK & INS. 246 (1987); Christopher Farrell, *The Crisis is Over—But Insurance Will Never Be the Same*, BUS. WEEK, May 25, 1987, at 122; Barbara D. Stewart, *Profit Cycles in Property-Liability Insurance*, in 2 ISSUES IN INSURANCE, *supra* note 99, at 111; Emilio Venezian, *Ratemaking Methods & Profit Cycles in Property & Liability Insurance*, 52 J. RISK & INS. 477 (1985); Winter, *supra* note 68.

along premium increases to clients or customers is limited by beneficiaries' ability to pay. Finally, many charitable organizations face greater disruption if they lose their coverage temporarily because funders or volunteers may be unwilling to accept a heightened risk of liability.[106]

III

THE APPLICATION OF TORT LAW TO CHARITABLE ACTIVITY: FAULTY PREMISES AND DUBIOUS INFERENCES

As critics of charitable immunity have persuasively argued, traditional rationales for denying all tort recovery against charitable organizations cannot withstand close scrutiny.[107] Although these critics exposed the flaws of charitable immunity, they never offered a satisfactory replacement for the doctrine they discredited. Demonstrating that charitable immunity is an indefensible policy does not prove that applying ordinary tort rules to charitable actors is the best alternative. A careful analysis of the rationales for imposing full tort damages reveals that these rationales do not hold against charitable organizations and volunteers.

Tort liability rules seek to deter injurious behavior, compensate victims, and spread an activity's losses among the beneficiaries of that activity.[108] In addition, the tort system manifests societal judg-

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106 The small proportion of the liability insurance market attributable to charitable organizations places them at a further disadvantage in obtaining appropriately priced coverage. Charitable organizations' premiums account for only about one percent of total premium volume for commercial lines. Charles Tremper, *Does Your Organization Scare Insurance Companies?*, NON-PROFIT TIMES, June 1989, at 27. Standard underwriting techniques developed to assess the riskiness of business activities are poorly suited to assessing the riskiness of charitable activity. Differences in the appropriate interpretation of charitable organizations' financial statements and those of for-profit enterprises make a charitable organization look riskier according to conventional underwriting principles. *See* JOSEPH RAZEK & GORDON HOSCH, INTRODUCTION TO GOVERNMENTAL AND NOT-FOR-PROFIT ACCOUNTING (1988). A charitable organization with no annual surplus appears to be a very unprofitable, hence high-risk, business.

107 Traditional arguments for charitable immunity have been categorized under four theories: trust fund, implied waiver, *respondeat superior*, and public policy. *See* President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 822 (D.C. Cir. 1942); Fisch, *supra* note 47, at 88-89; Lipson, *supra* note 1, at 484-90.

By 1964, "[a]greement as to the inherent invalidity of each of these foundations for the immunity doctrine [was] all but unanimous among the commentators." Fisch, *supra* note 47, at 88 (citation to nine sources omitted). Re-examination of those largely discredited traditional rationales is undertaken here because a number of the factors judges cited in abolishing charitable immunity several decades ago no longer apply. Most notably, tort liability today is far more expansive than it once was, with the consequence that a charitable organization's exposure to suit is much greater than charitable immunity's detractors had anticipated. Moreover, factors that were insufficient to justify complete immunity still provide support for an alternative to current tort rules.

108 *See* W. PAGE KEETON, DAN DOBBS, ROBERT KEETON & DAVID OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 1 (5th ed. 1984) [hereinafter PROSSER & KEETON]. In

ments about the value of various types of activity, the acceptability of causing injury, and the nature of obligations to assist those who suffer harm, thereby manifesting fundamental principles of justice.[109]

The dominant myth of modern tort law proclaims that individuals who suffer harm at the hands of another are entitled to full compensation for every element of loss.[110] As an organizing principle of torts, this myth is useful, but it is also misleading because it implies that full compensation should enjoy preeminence in the ordering of social values. As explained in this section, full compensation is not an a priori right.[111] The ideal of victim compensation clashes with and often yields to various other social goods. Accommodation of these conflicting values has produced a tort system replete with immunities, limitations on damages, restrictions on compensable losses, and other restrictions.[112] When limitations on recovery are recognized as necessary to fit the tort system into a multiplex sociolegal order, the basis for judging their appropriateness becomes clearer. This understanding leads to a more accurate formulation of tort law's operative credo: persons causing harm shall compensate their victims to the maximum extent consistent with accomplishment of other important societal objectives.[113]

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some respects the goals of the tort system resemble the goals of charitable endeavors. Both the tort system and the charitable sector aim to alleviate distress and transfer resources from more to less fortunate individuals. Conflict exists, however, between the standards they use in pursuing these goals. Tort law concentrates on the welfare of individuals victimized by identifiable acts of another person while charity offers its assistance more broadly.

109 *See* Jules Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5 (1983); George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Ernest Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983).

110 *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 149 (2d ed. 1977); Peter Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 393 (1984).

111 *See infra* notes 150-68 and accompanying text.

112 Some losses are too trivial to trigger tort liability.

> Liability of course cannot be extended to every trivial indignity. There is no occasion for the law to intervene with balm for wounded feelings in every case where a flood of billingsgate is loosed in an argnment over a back fence. The plaintiff must necessarily be expected and required to be hardened to a certain amount of rough language, and to acts that are definitely inconsiderate and unkind.

PROSSER & KEETON, *supra* note 108, at 59.

In a great many areas, barriers to tort recoveries come in the form of immunities or limitations applying to entire classes of potential defendants. *See* Richard Burke, *Privileges and Immunities in American Law*, 31 S.D.L. REV. 1 (1985); Dean Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 61 CHI.-KENT L. REV. 161 (1985).

113 Along the same line:

> It is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development. It is

Certain rationales of tort law rest on assumptions about self-interested behavior[114] that do not always fit the charitable sector.[115] Charitable organizations produce public benefits in a way that differs sharply from the contribution business activity makes to the common good. The principal result of commercial exchange is a gain by both buyer and seller as measured against their personal utility functions. A transaction will occur only if each party expects to be better off as a result, independently of any desire to benefit the general public. As a side effect, gains from the exchange or positive externalities[116] may redound to society's benefit. By contrast, an activity is charitable only if it produces some community benefit in addition to satisfying the needs of a particular individual.

The operation of charitable organizations routinely produces positive externalities in two ways. Some types of charitable activities, like education, produce positive externalities by their very nature. Other activities may produce positive externalities, and be charitable, only if performed in a certain fashion. By harnessing donations of time, money, and materials, a charitable organization may deliver free or reduced-cost services to the poor or otherwise needy.[117] The charitable organization, on behalf of its donors and volunteers, gratuitously transfers the difference between the value of the service and the amount charged for it.

For-profit businesses operate in exactly the opposite fashion. A business firm will seek to charge a price for benefits it provides that

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> perhaps more accurate to describe the primary function as one of determining when compensation is to be required. Courts leave a loss where it is unless they find good reason to shift it.

PROSSER & KEETON, *supra* note 108, § 4 (footnote omitted).

114 The economic theory of personal utility maximization posits that, on the whole, people make rational choices that advance their individual welfare in accord with their personal preferences. *See* Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67 (Robin Hogarth & Melvin Reder eds. 1986) (describing and critiquing standard economic assumptions about human behavior).

115 Economists have attempted to explain altruism and philanthropy in a fashion consistent with the principle of personal pleasure maximization, possibly because altruistic behavior appears to limit the generalizability of key economic assumptions. *See* GARY BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 282-309 (1976); DAVID FRIEDMAN, PRICE THEORY 489-96 (1986); *cf.* AMITAI ETZIONI, THE MORAL DIMENSION 51-53 (1988). Regardless of how fervently the proponents of these explanations assert that neoclassical economics applies to the actions of charitable organizations and volunteers, they concede that their theories must be understood somewhat differently in the charitable sector.

116 Positive externalities are benefits from the activity of a producer for which the producer cannot obtain compensation. For a classic discussion of externalities, see A.C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1948).

117 A charitable beneficiary might not be poor and might be needy only for a limited time. When stranded by rising flood waters, a millionaire may be as appropriate an object of charitable effort as a pauper.

captures their full monetary value. Gains from exchange may incidentally redound to society's benefit, but business firms, unlike charitable organizations, always have an incentive to avoid externalizing benefits. If a for-profit corporation can charge full value for production of such benefits, it ordinarily will do so to fulfill its obligation to its shareholders.

The functional characteristics of the charitable organization and the peculiar motivations of charitable actors make full imposition of liability and damages on charitable actors dysfunctional. As explained below, deterrence is nonspecific and overly potent,[118] losses are not spread satisfactorily,[119] and full compensation of victims' losses sacrifices superior values.[120] Moreover, in its current form, the tort system conveys the message that the only injuries that should alter the behavior of an actor are those for which liability will be imposed. This message may be appropriate to stimnlate economically efficient behavior, but it is contrary to the charitable sector's credos of compassion and benevolence.

A. Deterrence

One of the primary objectives of tort law is to deter harmful behavior.[121] By internalizing the cost of a loss to the entity that causes it, the tort system provides a financial incentive to act with due care. According to orthodox economic theory, failure to shift the full costs of injuries from victims to tortfeasors results in an inefficiently high level of harm-producing activity and too many losses.[122] Requiring charitable actors to pay damages undoubtedly will impel them to change their behavior; the critical question is whether those changes will be desirable. In the realms of business and private affairs for which it was developed, loss internalization serves the essential function of counterbalancing incentives to bene-

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118 *See infra* notes 121-37 and accompanying text. Overdeterrence of socially beneficial conduct may occur in the business community as well. *See* Stephen Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 581-82 (1985). Absence of a profit motive increases the likelihood of overdeterrence in the charitable sector.

119 *See infra* notes 138-48 and accompanying text.

120 *See infra* notes 149-68 and accompanying text.

121 GUIDO CALABRESI, THE COST OF ACCIDENTS 135 (1970); R. POSNER, *supra* note 110, at 154-57.

122 Only activities that are economically inefficient should be deterred. Paraphrasing the classic Learned Hand risk-utility maxim, the RESTATEMENT (SECOND) OF TORTS § 291 (1965) denominates an action as negligent "if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." If the tort system did not impose liability on this basis, individuals would not have sufficient incentive to implement cost-efficient loss-reduction measures. *See* G. CALABRESI, *supra* note 121, at 17-18; John Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

fit at another's expense. Only if losses are fully monetized will the profit-oriented accounting of the business sector provide actors with appropriate financial cues to incur loss-reducing expenses. The deterrence rationale for tort liability rests largely on the assumption that individuals act as personal utility maximizers who implement risk reduction strategies commensurate with the discounted value of the loss multipled by the probability of its occurrence. Because of this, the rationale's validity as applied to charitable actors is questionable.[123]

1. *Responsiveness of Charitable Actors to Tort Law's Economic Cues*

Although financial considerations plainly influence decisions in the charitable sphere just as they do in the business sphere, the considerations differ for each. Charitable organizations do not operate to maximize profit for shareholders and cannot permissibly distribute profits to private parties. Moreover, unlike business firms, charitable organizations ordinarily do not recoup from consumers the largest possible economic return for services performed. A business firm has a powerful incentive to charge the maximum price the market will bear. A charitable organization may operate in exactly the opposite fashion. In providing services, a charitable organization may attempt to maximize the value to society of the organization's activities relative to the amount charged.[124] Requiring charitable organizations to externalize benefits and simultaneously internalize the total costs of producing those benefits by paying full compensation in tort creates an untenable imbalance.

The economic cues of tort liability do not affect the charitable organization in the same way they affect business firms. For charitable actors, the bar on distributing profits to private parties eliminates a major incentive to undertake high-risk activities. While success at an activity with a high tort exposure will earn little, if any,

123 A better understanding of bebavior among individuals who serve or control but do not own charitable organizations could greatly improve the analysis. In addition to the conclusions that follow from the limited available empirical research on the motives of charitable actors, see, *e.g.*, BURTON WEISBROD, THE NONPROFIT ECONOMY (1988); Dennis Young, *Entrepreneurship and the Behavior of Nonprofit Organizations: Elements of a Theory*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS 161 (Susan Rose-Ackerman ed. 1986), inferences can be drawn from the structure and dynamics of the charitable sector. Even outside the charitable sector, the rational utility maximizer model has its limitations. *See* Dean Peachey & Melvin Lerner, *Law as a Social Trap*, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR 439, 451-53 (1981).

124 A charitable organization can achieve this result only by marshalling the contributions of donors, volunteers, or government funding. "All nonprofit organizations, just like profit-seeking organizations, ultimately must cover the full economic cost of all resources that they consume. . . . There is no magic by which a nonprofit firm can produce a service at a lower cost than can a for-profit firm." Hansmann, *supra* note 31, at 880.

economic reward for the controllers of a charitable organization, failure may mean extinction of the organization and loss of whatever benefits the controllers derive from the organization.

The tort system's failure to provide clear, immediate incentives for taking particular actions to reduce the likelihood of harm heightens the likelihood that a charitable organization will be overly cautious in response to a serious threat of liability.[125] Unlike business entrepreneurs who stand to profit handsomely if their firms operate successfully at the edge of liability, the controllers of a charitable organization do not have a strong economic incentive to fine tune their operations to produce the greatest possible benefit for society without causing legally cognizable injury. Rather than jeopardize its mission, a charitable organization may constrain its operations to remain far from the danger zone of liability.[126]

Conversely, to the extent charitable actors are motivated by noneconomic forces to provide services and improve society, they may not eliminate risky activities as readily as would a profit-maximizing business firm. For some charitable sector decision-makers, sacrificing material benefits and accepting extra risks may be a tolerable consequence of working with highly vulnerable populations.[127] Thus, even though we cannot be certain how particular individuals in the charitable sector will respond to the tort system's economic cues, we can be confident that the model for predicting business world behavior is inapposite.

The absence of approximate equality between the revenue a charitable organization receives from its direct consumers and the value of the services it provides further reduces the utility of the tort system's economic cues. Imposing the full costs of tort liability on business firms promotes optimal resource allocation by forcing businesses into bankruptcy when the total societal benefits it produces (translated into revenue to the firm) fall below total costs. For charitable organizations, the inability to produce revenue in excess of

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125 Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 796-99 (1985); Richard Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell*, 36 U. FLA. L. REV. 413, 417 (1984); Cornelius J. Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1353, 1373 (1974); Richard Pierce, *Encourging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980); William Rodgers, *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1 (1980); Sugarman, *supra* note 118, at 559-91.

126 For charitable organizations that provide only one service and would cease to exist if they discontinued that service, the incentive to modify rather than abandon operations is stronger.

127 The true motivations of charitable actors are unknowable. Professor Dennis Young reprises a range of conjectures by other commentators in IF NOT FOR PROFIT, FOR WHAT? 15 (1983); *see also* FRANKLIN GAMWELL, BEYOND PREFERENCE 19-28 (1984) (comparing motives of profit-seekers and charitable actors).

costs does not necessarily indicate that the organization lacks utility. Moreover, imposing the cost of tort liability stymies purely volunteer activity rendered without charge. The benefits of such activity may be immense and the loss slight, but because the organization does not recoup the monetized value of the benefits, internalizing losses imposes costs that the organization cannot pay.

Because a charitable organization may deliberately attempt to produce benefits in excess of fee-for-service income, red ink does not signal inefficiency the way it does for business firms. Because revenue for a charitable organization is largely independent of the costs of operation, a deficit ordinarily calls only for reducing services to whatever level the revenue supports rather than stopping the activity altogether. Thus, higher costs, whether attributable to tort liability or rent increases, affect a charity's decision regarding continuation of operations much less directly than they do in the business world.[128]

The incentive structure that results from imposing full damages for losses caused by tortious charitable activity is especially skewed for volunteers. In the course of rendering charitable services, volunteers usually have no opportunity to profit monetarily at the expense of others. The financial inducements that influence the behavior of corporate directors are muted because volunteer directors have no financial stake in an organization and generally do not receive monetary compensation for serving as a director. Compounding the problem, volunteers of many charitable organizations have substantial personal assets relative to the organization's resources. An individual's exposure to suit often is greater as a volunteer than as an employee, even though volunteers earn no income.

2. *Distortions of Liability Insurance*

Insurance further distorts the deterrent effects of tort law on undesirable behavior of charitable actors. To obtain insurance, a charitable organization must satisfy an insurer that it is an acceptable risk. Once insured, an organization receives its risk management cues principally from the insurer rather than the tort

128 While tort liability reduces the amount of donations that can be spent on charitable activity, donors' perceptions of that diminution will almost always be much less acute than the awareness of consumers who pay higher prices or owners who receive lower profits. Being unaware of exactly how many mouths their contribution will feed or how much service it will provide, a donor has very little basis upon which to make any judgment about how to respond to liability exposures. Although an organization's efficiency in delivering services may influence donors' willingness to contribute, it has no direct effect on the amounts they contribute.

system.[129] Insurers may require organizations to observe not only the level of care necessary to avoid an economically inefficient level of legal liability, but also a higher standard that minimizes the likelihood of a claim.[130] Insurers can influence program decisions by refusing to insure certain activities, charging differential amounts for covered risks, and mandating compliance with specified risk management standards.

Insurers' traditional narrow focus, or lack of focus, on risk reduction creates a difficult choice for charitable organizations. Although insurers may contribute to improving safety, some commentators contend that they do little to promote due care.[131] Although insurers sometimes have worked with policyholders to reduce the risk of loss,[132] almost all of that effort has been directed toward property exposures rather than liability risks.[133] Insurers' principal exposure-reducing strategy is refusing coverage to applicants that are perceived to present higher than average risks. The nature of charitable organizations and the services many of them perform place them at a severe disadvantage in this process.[134] As a result, charitable organizations may be faced with the unpalatable choice of discontinuing high-risk services or operating without insurance. New organizations, such as AIDS hospices, that come into

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129 *See* KENNETH ABRAHAM, DISTRIBUTING RISK 10-13 (1988); Sugarman, *supra* note 118, at 573.

130 The commentators disagree about the extent to which liability insurers can motivate insureds to act with reasonable care. *Compare* John G. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 823 (1967) ("The deterrent function of the law of torts was severely, perhaps fatally, undermined by the advent of liability insurance.") *with* Fleming James, Jr. & John V. Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROBS. 431, 441 (1950) ("[T]here is no substantial reason to believe that the existence of wide-spread insurance has fostered irresponsibility.").

131 *See, e.g.*, Herbert S. Denenberg, *Products Liability Insurance: Impact on Safety and Implications for the Consumer*, in NATIONAL COMM'N ON PRODUCT SAFETY LAW & ADMIN.: FEDERAL, STATE, LOCAL AND COMMON LAW 247 (1970) (volume 3 of the supplemental studies to the final report of the national commission); David Hemenway, *Private Insurance as an Alternative to Protective Regulation: The Market for Residential Fire Insurance*, 15 POL'Y STUD. J. 415, 415-16 (1987); Ralph Nader, *Loss Prevention and the Insurance Function*, 21 SUFFOLK U.L. REV. 679, 680-81 (1987) (contending that insurers are content to charge higher premiums for greater risks rather than work diligently with policyholders to reduce the risks).

132 One hundred years ago, industrialists created mutual insurance companies to insure manufacturing plants and mills. The plant and mill owners who created those companies put a great deal of effort into safety engineering to protect against fires and other losses. THE FACTORY MUTUALS: 1835-1935, 200-84 (1935). The Underwriters' Laboratories developed out of insurers' efforts to improve product safety. HARRY CHASE BREARLEY, A SYMBOL OF SAFETY 17-23 (1923).

133 *See* Sugarman, *supra* note 118, at 580 (citing studies).

134 From an insurer's perspective, any of the following characteristics may justify denial of coverage: use of volunteers; involvement with minority, infant, or disabled populations; poorly developed risk management procedures; and absence of surplus. *See* B. STONE & C. NORTH, *supra* note 80, at 34-36.

existence to meet a pressing community need have almost no prospect of obtaining insurance during their first few years.[135]

3. *Nontort Influences on the Riskiness of Charitable Activity*

Finally, many factors independent of tort law induce charitable actors to act responsibly.[136] Such factors include the strong interest in avoiding injury to oneself, socialization against harming others, and concern for social opprobrium. In many instances, regulatory and criminal sanctions deter undesirable conduct. These legal deterrents differ from tort law in that a government official rather than an injured party must bring an action, the proscribed conduct is specified in advance with relative clarity, and the penalty is fixed within known limits. These characteristics increase the probability that managers of charitable organizations will comply with the pertinent standards. Because they cannot distribute profits, charitable organizations do not have as strong an economic incentive as business firms do to circumvent regulations.

These factors not only affect how an organization undertakes an activity; they also influence decisions about which activities an organization undertakes. Liability is most likely to deter the provision of services that have the least direct benefit for the service provider. For example, Little League programs in suburban communities are likely to survive because the volunteers and other necessary resources come from the same community that receives the benefit from the program.[137] The prospect of liability is more likely to discourage suburbanites from volunteering in the inner city.

B. Loss Spreading

Loss spreading is a separate justification for imposing a full measure of damages on business firms that cause harm. Firms can spread losses broadly among individuals who benefit from the harm-causing activity.[138] Depending on the economics of the situation,

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135 Congressman Porter tells the prototypical story of a Junior League that sought to establish a shelter for battered women in Evanston, Illinois. No insurer would offer coverage during the center's first three years. Faced with the prospect of personal liability, the center's organizers abandoned their mission. Porter, *supra* note 11.

136 *See* GEORGE EADS & PETER REUTTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 39-90 (1983); Sugarman, *supra* note 118, at 561.

137 Even Little Leagues are hampered by full liability, however. *See Hearing on S. 929*, *supra* note 71, at 176-77 (testimony of Creighton J. Hale, President, Little Leagues of America).

138 Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 205, 447 A.2d 539, 547 (1982), *limited by*, Feldman v. Lederle Labs., 97 N.J. 429, 479 A.2d 374 (1984); Ray v. Tucson Medical Center, 72 Ariz. 22, 35-36, 230 P.2d 220, 229-30 (1951); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

losses are spread either among consumers through increased prices or among owners by virtue of lower profits.[139] Either way, someone who derives a substantial direct benefit from the injury-producing product or activity bears the cost.

This rationale for loss-spreading in the business sector does not easily translate to charitable organizations. A charitable organization has no owners who receive profits and may serve consumers who do not pay full value. Only if the organization delivers a service in exchange for a fee that covers the full production cost, including loss costs, is the loss spread among individuals who benefit directly from the service.[140] For the subsidized services typical of the charitable sector, losses are spread among donors in the sense that donors' contributions produce fewer charitable benefits per dollar.[141] Because donors do not receive any financial benefit from the injury-causing activity,[142] burdening them with the tort losses those activities produce is less clearly justifiable than spreading losses among consumers or owners.[143]

While losses are spread primarily among donors, the impact of tort liability falls most directly upon beneficiaries who would have received services but for the liability-related expenses of a charitable organization. This result contrasts sharply with the effects of loss-

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139 *See* K. ABRAHAM, *supra* note 129, at 18-31. Loss spreading in the business sector occurs regardless of whether a firm insures. Through insurance, businesses can spread losses among larger pools of investors or consumers.

140 Spreading loss costs among society's least fortunate is itself unappealing in many cases, especially if the injured party is well-to-do. Nonetheless, losses spread through the tort system may result in the poor paying for the expenses of the rich. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1546 (1987).

141 The work of Henry Hansmann is especially notable for characterizing donors as purchasers of charitable services who receive value for their money on much the same basis as ordinary consumers. Hansmann uses the Red Cross as an example to explain how certain contributors buy disaster relief. The Red Cross is, in a sense, in the business of producing and selling that disaster relief. The transaction differs from an ordinary sale of goods or services only in that the individual who purchases the goods and services involved is different from the individuals who receive them. Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 61 (1981).

142 Regarding charitable hospitals, the Virginia Supreme Court noted, "[t]he citizens who contributed to the hospitals can never get a return in money from their contributions. The charters of the corporations do not permit it, and the donors do not expect it." City of Richmond v. Richmond Memorial Hosp., 202 Va. 86, 91, 116 S.E.2d 79, 82 (1960).

Facile application of economic theory may mask the critical difference between donors on the one hand and owners on the other. According to neoclassical economic theory, both donors and owners must obtain sufficient value from their uses of money to induce them to allocate it as they do. Donors receive psychic or other intangible benefits instead of an economic return. Unlike an economic return, however, psychic benefits do not provide a source of funds from which to pay a tort award or insurance premiums.

143 Government funding changes this analysis somewhat. The use of tax revenues to provide charitable services spreads losses among taxpayers.

spreading in commercial markets. There, consumers are free (within their economic means) to pay a higher price that includes a pro rata share of loss costs. This option is not available to potential recipients of free charitable services. The dynamics of the free service delivery system produce a dichotomy in the availability arrangement: prospective beneficiaries either receive a service without charge or they do not receive it at all. For the distribution of public goods, therefore, imposing a fee to cover loss costs is not feasible.

Moreover, because charitable organizations do not recoup the full value of the services they perform, they have no tort reserve to tap when their activities cause harm.[144] An organization may produce incalculable positive externalities for years without incident. When faced with a lawsuit, the organization cannot assign the externalized benefits it produced in satisfaction of the claim. Likewise, psychic satisfactions that the organization's donors, employees, and volunteers might derive from their activities cannot be converted to cash to pay tort awards.

Assessing the desirability of using charitable organizations as loss spreaders also requires consideration of loss spreading alternatives. Losses may be spread very effectively via first-party insurance and government-sponsored health care for the indigent. If a loss is covered under such a program, compelling compensation from the charitable organization that caused the harm stands the rationale for loss spreading on its head. Such losses would be spread more efficiently by the victim's own insurer or the government.[145] Using those first-party mechanisms would spread losses across all insureds or taxpayers, which is much more satisfactory where the cause of the harm is a charitable organization rather than a business firm.[146] All members of the public are assumed to benefit from charitable activity[147] and spreading losses through first-party insurance diffuses the losses as widely as the benefits.

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144 A charitable organization may nonetheless have money in the bank. The mere possession of funds is quite different from a business's surplus that results from capturing the full monetary value of all benefits the business produces.

145 First-party insurance is more efficient than third-party liability insurance because there is no need to assign responsibility for the loss prior to compensating the victim. *See* JEFFREY O'CONNELL, THE LAWSUIT LOTTERY chs. 10, 11 (1979); Jeffrey O'Connell & Janet Beck, *Overcoming Legal Barriers to the Transfer of Third-Party Tort Claims as a Means of Financing First-Party No-Fault Insurance*, 58 WASH. U.L.Q. 55 (1980); Jeffrey O'Connell & James Guinivan, *An Irrational Combination: The Relative Expansion of Liability Insurance and Contraction of Loss Insurance*, 49 OHIO ST. L.J. 757 (1988).

146 In this respect, charitable activity differs from activities in which the participants are also the beneficiaries. For those activities, internalizing loss costs so that the activity bears its full costs ordinarily is the most advantageous and defensible alternative. *See* ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC COMPENSATION FOR THE TRAFFIC VICTIM 257-60 (1965).

147 *See supra* notes 116-17 and accompanying text.

The intractable problem with relying exclusively on first-party insurance for loss spreading is that not everyone is insured.[148] Consequently, loss spreading among charitable organizations through third-party insurance may be the only available alternative to burdening the victim alone with a loss. Despite the imperfections of this strategy, it may be a necessary second-best alternative in some situations.

C. Victim Compensation

The most ancient function of tort law is simply to compensate injured parties for their losses.[149] If the attendant right to recovery vests in the injured party at the moment of the tort, denying full recovery to the victim of a charitable actor's tortious conduct could amount to a "taking"[150] or to extracting an "involuntary contribution"[151] from the victim. If full compensation is conceptualized as a tort victim's inherent right, the involuntary contribution argument is quite strong. On the other hand, if the measure of compensation is understood as a compromise that accommodates divergent moral intuitions and economic factors, the logic of the involuntary contribution argument collapses. This issue must be resolved here since the conceptualization of entitlement to full tort compensation as an inherent right would foreclose further inquiry into predominantly utilitarian arguments for deciding how to assess damages.

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148 Experts disagree about the extent to which private health insurance and government-sponsored programs would pay benefits in the absence of insurance to individuals who might seek tort recoveries. Professor Priest has asserted that the percentage of individuals who would not be able to draw upon some form of insurance or public assistance program if injured is very small. Priest, *supra* note 140, at 1586-87. Priest's contention on this point is far from being the unanimous view, however. *See, e.g.*, HEALTH INS. ASS'N OF AM., 1986-1987 SOURCE BOOK OF HEALTH INSURANCE DATA (1988); Randall R. Bovbjerg & William J. Kopit, *Coverage and Care for the Medically Indigent: Public and Private Options*, 19 IND. L. REV. 857 (1986) (offering much higher estimates of individuals without access to insurance).

Sick-leave and similar employee benefit plans cover approximately two-thirds of the workforce, and a larger proportion receives such benefits without a formal agreement. Daniel N. Price, *Income Replacement During Sickness, 1948-78*, SOC. SECURITY BULL., May 1981, at 18.

149 *See* PROSSER & KEETON, *supra* note 108, at 5-6; Cecil Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944).

150 *See* Note, *The Quality of Mercy: "Charitable Torts" and Their Continuing Immunity*, 100 HARV. L. REV. 1382, 1389-90 (1987).

151 In Malloy v. Fong, 37 Cal. 2d 356, 366-67, 232 P.2d 241, 247 (1951), the California Supreme Court cited FOWLER V. HARPER, THE LAW OF TORTS § 294 for the contention that denying recovery to an injured party on the grounds of charitable immunity "is to require him to make an unreasonable contribution to the charity, against his will." The court reached this conclusion even though the victim was receiving services from the defendant church at the time of injury.

1. *Denial of Full Recovery Does Not Compel Tort Victims to Make Involuntary Contributions*

The involuntary contribution argument is specious. Its surface appeal stems from use of the pejorative notion of compulsion to express the more neutral economic concept of subsidization.[152] All of tort law consists of rules specifying the conditions for allowing recovery and computing damages. Whether to shift a loss and how to measure damages are controversial questions capable of many answers, each of which produces different financial results for injured and injuring parties. Nothing compels the conclusion that standard tort rules provide the correct benchmark.

To see the artificiality of the involuntary contribution contention, imagine that charitable organizations enjoy both tort immunity and exemption from workers' compensation. If a charitable organization's employee were injured in a workplace accident and denied recovery, would the employee's involuntary contribution be equal to the amount she would have received under workers' compensation? Or would it equal her potential recovery under the tort system? Denial of recovery may effectuate a sort of subsidization of charitable organizations by tort victims, but it is impossible to fairly equate the subsidization with the amount some other defendant would have been required to pay.

A separate problem with the logic of the involuntary contribution argument is that the gain to the individual tortfeasor is rarely equal to the injured party's loss. An employee's momentary lapse of judgment, which might have no value at all for the employer-charitable organization, could be very costly. If risk of loss is substituted for actual loss, the charitable organization might be thought of as having received the value of operating without adequate precautions. That amount, however, would be a small fraction of the total

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152 Transferring the "involuntary contribution" concept to contexts that do not involve charitable organizations helps to expose its vacuity and to reveal how subsidization should be considered in fashioning tort policy. For example, the victim of an assault by a negligently paroled convict might be thought of as making an involuntary contribution to the penal system if the parole board is immune from suit. Negligently injured employees whose recovery is limited under workers' compensation might be thougbt of as involuntarily contributing to either their employers or to other employees who recover under workers' compensation for workplace injuries that do not result from negligence. The involuntary contribution formulation does not make sense in either situation. The question in each case is whether the trade-offs achieve a fair balance. Denial of full recoveries to the victims of parole board errors and workplace accidents is an integral part of a larger system that accommodates many interests. The parolee's victim and the negligently injured worker are not due any particular compensation aside from what the law entitles them to receive. Tort law's compensation rules are not independently ordained natural principles. They result from an attempt to achieve the aims of tort consistently with pursuing a host of other objectives.

amount the injured party is said to contribute.[153] Who receives the remainder of the "contribution"? The only possible answer is other organizations with loss exposures similar to those of the injuring organization: Those organizations would need to implement more expensive measures to prevent injury or pay insurance premiums based on higher anticipated claims.

This reformulation results in the injured party's contribution being made not to a single charitable organization, but to the charitable sector as a whole, or the portion similar to the injuring organization. Any element of uncompensated loss might then be seen as subsidizing a type of activity rather than a particular organization. To some extent, this loss may be balanced against the free benefits injured parties receive from charitable activity during their lifetimes. Thus, the magnitude of the net loss is smaller for harm caused by charitable activity than for harm caused by other types of activities.

2. *Spreading the Impact of Charitable Dollars*

If entitlement to a specific level of compensation is not a tort victim's inherent right, establishing the proper level of compensation becomes a policy issue that invites a comparison of how charitable organizations use funds that might be allocated to paying tort awards. Payment of a tort award by a business firm or private individual results in a transfer of money from one private use to another. By contrast, payment of a tort award by a charitable organization results in a transfer of money from a public use to a private use. A one million dollar tort payment by a charitable organization results in a private benefit to a particular individual and a commensurate reduction of charitable services that produce public benefits.[154] Because any recovery by a tort victim harmed by a charitable actor results in a loss to the charity and an indirect loss to the general public, any discussion of the tort liability of charities requires separate examination of several elements of tort damages.

In a typical personal injury tort case, the plaintiff seeks damages for both economic loss (*e.g.*, medical bills) and noneconomic losses (*e.g.*, pain and suffering). In many instances, one source of payment for the victim's economic loss may be first-party health insurance

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153 The charitable organization's savings need not equal the total loss from any single incident, but only the amount of the loss multiplied by the likelihood of its occurrence. For the charitable sector as a whole, insurers could use the magnitude times probability computation in establishing premiums for each organization proportional to their prorated share of losses for the entire sector.

154 If the payment comes from liability insurance funds in a market where risks are appropriately pooled and priced, the payment will be distributed among organizations performing similar functions. Therefore, the result is still a one million dollar reduction in charitable services.

provided by either a private company or the government. In the absence of such insurance or for amounts in excess of coverage, expenses must be met in some other fashion. Recovery from the tortfeasor for these unreimbursed pecuniary losses compensates a victim for the identifiable financial hardship resulting from a tortfeasors' act. Repayment for these expenses is clearly restorative. Even though economic losses may be very costly, imposing them on charitable actors merely leaves their victims in the same financial position they would have been in but for the injury.

a. *Noneconomic Losses*

Although noneconomic losses are no less real than economic losses, they are not compensable in the same way.[155] The monetary award a disfigured person receives for pain and suffering may make the loss more endurable, but it does not reduce the pain or relieve the suffering.[156] What victims need are supports for living with the pain and suffering they endure. Giving them money is an imperfect remedy that may trivialize the injury and degrade the victim.[157]

For injuries caused by businesses or private individuals, monetizing the noneconomic loss is amply justified by the deterrence and loss spreading functions of torts.[158] When a charitable actor causes the harm, the benefits the charitable sector provides to all who endure pain and suffering undercut those justifications.

The impact of awards of noneconomic losses by charitable organizations and businesses must be viewed in light of commitment to the production of public benefits. Tort victims and many charitable beneficiaries have suffered misfortune and are appropriate objects of compassion, generosity, and care.[159] Awarding a cash

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155 Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 770 (1987). *But cf.* RICHARD POSNER, THE ECONOMICS OF JUSTICE 61-62 (1981); R. POSNER, *supra* note 110, at 149-51 (offering the idea of a hypothetical market for injuries). Judge Posner's market notion may improve the process of awarding damages for pain and suffering, but it does not rebut the contention that the two are fundamentally incommensurable. Availability of money may enable the victim to purchase goods and services that could be considered very rough substitutes for health. *See also* Bell, *supra* note 110, at 398.

156 As the Supreme Court has observed, "physical suffering must be borne by the [injured party] alone; the laws of nature prevent this from being evaded or shifted to another." New York Cent. R.R. v. White, 243 U.S. 188, 203 (1916).

157 *See* Richard L. Abel, *Torts*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 185, 195-96 (David Kairys ed. 1982); *see also* Hutchinson, *supra* note 17, at 762 ("Human life and suffering represent just one more variable in the production-consumption equation.").

158 Only by assigning a financial value to noneconomic losses will the tort system provide most actors with sufficient economic incentive to implement efficient loss-reduction strategies. Moreover, failure to impose damages for pain and suffering may allow tortfeasors to benefit at their victims' expense.

159 The tort victim may also be a beneficiary of the charitable sector. One opinion

sum for the pain and suffering of a charitable organization's tort victim meets the needs of the victim at a high level while depriving assistance to numerous potential beneficiaries at the much lower level charitable organizations ordinarily provide. This result is quite different from what occurs in the business world, where firms are neither required to devote their resources to producing public benefits nor prohibited from distributing their profits to private individuals.

In addition, noneconomic losses are notoriously difficult to quantify for purposes of compensation.[160] Whatever the theoretical plausibility of placing a monetary value on disfigurement or paralysis, no satisfactory mechanism exists for performing that task. Consequently, awards for similar injuries vary dramatically.[161] A sympathetic jury, skillful legal representation, and a variety of other factors that account for the difference between large and small pain and suffering awards hardly justify compensating some plaintiffs far more than others.[162] The large element of chance in the distribution of pain and suffering awards intensifies the inequity of concentrating charitable resources on the few individuals who fare best under the tort system.[163]

Awarding recoveries for pain and suffering may also increase the net cost of a tort loss to society. Such payments result in a

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notes this possibility derisively, observing that if an individual is injured or killed by a charitable organization, "the chances are high that as a direct result he or the members of his family will become dependent upon some *other* nonprofit institution organized for charitable purposes, unless recovery may be had." Avellone v. St. John's Hosp. 165 Ohio St. 467, 476, 135 N.E.2d 410, 416 (1956) (emphasis in original).

160 *See* Herb v. Hallowell, 304 Pa. 128, 133, 154 A. 582, 584 (1931); THE CURRENT CRISIS, *supra* note 99; GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: A FRAMEWORK FOR ACTION 26-28 (May 1987); Ingber, *supra* note 125, at 778, 804. In establishing safety regulations, the federal government "has decided, on different days and in different ways, that the dollar value of a life is as little as $70,000, as much as $132 million, anywhere in between and impossible to measure." Marianne Lavelle, *Placing a Value on Human Life*, Nat'l L.J., Oct. 10, 1988, at 1, 28, col. 1.

161 *See* John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1203-04 (1984); Ingber, *supra* note 125, at 778; Jeffrey O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L. REV. 17, 19 (1986).

162 *See* Jeffrey O'Connell, *Offers That Cannot Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U.L. REV. 589, 591-93 (1982). After quoting several trial attorneys regarding the effects of strategies to manipulate jurors' sympathy, O'Connell summarizes:

> [L]awyers commonly estimate that the value of pain and suffering from disability increases by ten percent for every ten years of the claimant's age over forty; that disability to a female claimant is worth twenty-five percent more than the same disability to a man; and that disability to a child is worth much more still. It also explains why injuries of similar severity, but of differing visibility, fluctuate so in value.

Id. at 592.

163 *See generally* Clarence Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959).

double burden on society because they reduce assets of the payor without directly lessening the recipient's actual loss.[164] This contention has considerably more force when the payment comes from a charitable organization that must commensurately decrease its services[165] rather than from a business firm that can spread the loss across shareholders and consumers.

b. *Lost Income*

The appropriate level of compensation for lost income also is not readily apparent. As with out-of-pocket expenses, lost income directly impairs the financial status of the injured party. Like a noneconomic loss, though, the value of lost income is conjectural. Therefore, the rationale for shifting the entire estimated loss of some victims is less compelling than the rationale for shifting out-of-pocket losses.

Lost income may be assessed by a variety of methods. Victims of charitable organizations' torts might be compensated at a single flat rate for labor they are unable to perform, similar to the single rate of compensation jurors receive. Alternatively, the court might award the maximum amount the victims could have earned but for their injury. Aside from the assessment problems of a full income replacement standard, its use would deprive workers of any monetary incentive to return to their jobs after suffering an injury. Compensation at a victim's last rate of pay comes closest to the ordinary tort standard.

The workers' compensation system offers an intermediate alternative. Under workers' compensation, injured employees are given an amount that varies with their wage level, but is less than the full wage at all levels and is substantially less toward the top of the income scale. The workers' compensation system justifies this level of compensation largely on the ground that recovery is more readily available than if the injured party were to proceed in tort.[166] In addition, the recovery is not taxed.[167] Thus, for many workers, the lower level of compensation approaches their after-tax income. Higher income individuals, who are less fully compensated under the system, have the option of independently purchasing first-party insurance to maintain their pre-injury standard of living. A compen-

164 This argument is advanced by Ingber, *supra* note 125, at 799.

165 Whether the loss is covered by insurance is irrelevant for this analysis. Insurance merely spreads the loss among similar organizations. Whether one charitable organization pays the entire judgment or the cost is spread through the insurance mechanism to a group of charitable organizations, it results in a transfer of charitable resources to private parties.

166 *See* 1 WILLIAM SCHNEIDER, WORKMEN'S COMPENSATION TEXT 5-13 (1941).

167 Tort recoveries for lost income also are not taxed. *See* I.R.C. § 104(a) (1989).

sation system for individuals injured in the course of charitable activity should most appropriately resemble the workers' compensation wage replacement system.

c. *Collateral Recoveries*

According to the logic of the argument against recovery for noneconomic losses, charitable resources should not be awarded in excess of actual financial loss. Application of this principle, together with recognition of the aforementioned problems with loss spreading in the charitable sector, compels reversing the common-law rule that requires tort defendants to duplicate payments that their victims receive from collateral sources.[168] The relatively fortunate individuals who enjoy health insurance benefits have little claim to charitable resources. Diverting charitable resources to compensate them doubly for losses is indefensible. Eliminating duplicate compensation would advance the objective of preserving charitable resources for producing community benefits.

D. The Symbolic Significance of Torts

In addition to its primarily economic functions, the tort system both reflects and shapes community mores about causing losses and assisting the victims.[169] Failure to respect societal mores may delegitimize the tort system and encourage would-be litigants to resort to undesirable self-help remedies. Failure to hold charitable actors sufficiently responsible for their injury-causing activities may also threaten the legitimacy of the charitable sector. Thus, the tort rules for charitable actors should comport at least roughly with moral intuitions about responsibility and justice.

The recovery an injured person receives depends on multiple factors that have always included the tortfeasor's status and objectives.[170] Therefore, it would not be unprecedented to tailor or limit the recovery of a tort victim based upon the charitable status of the

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168 Commentators have questioned the wisdom of the collateral source rule from numerous perspectives. *See* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966); Fleming James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 47 N.Y.U. L. REV. 537 (1952); William Schwartz, *The Collateral Source Rule*, 41 B.U.L. REV. 348 (1961).

169 From its earliest incarnation, tort law has evolved in response to "a deep sense of early common law morality that one who hurts another should compensate him." *See* Leon Green, *Forseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1412 (1961). For discussions about the symbolic value of awards and the functions of tort law in achieving retributive or corrective justice, see Coleman, *supra* note 109; Ingber, *supra* note 125, at 781. Application of that moral precept today is affected by various forms of insurance that shift the loss away from either of the parties directly involved in an incident.

170 *See supra* notes 106-13 and accompanying text; *see also* Martin A. Kottler, *Motivation and Tort Law: Acting for Economic Gain As a Suspect Motive*, 41 VAND. L. REV. 63 (1988).

actor who caused the injury. True, a traffic accident victim may logically argue that his injury is no less serious if the driver of the negligently operated vehicle is an employee of United Airlines or a volunteer for the United Way.[171] However, the injured individual would also be no less harmed if the car had been driven by an indigent, uninsured motorist or propelled by the winds of a tornado. In either case, compensation from the cause of the loss would be wholly unavailable under the present tort regime. Denial of recovery based on the status of the actor who caused the injury does not necessarily violate societal mores.

Whether a sense of justice is violated by rules for charitable organizations compensating persons they injure also may depend on whether the injured person is an object of the organization's beneficence. One of the rationales advanced for charitable immunity is that charitable beneficiaries waive their tort rights in exchange for the free or subsidized services they receive.[172] According to this reasoning, the needy may freely choose whether to accept a charity's assistance, but once they do, they will be held to have assumed the risk of injury or impliedly waived a right of recovery.

The assumption that needy individuals impliedly waive their tort rights in exchange for assistance is clearly tenable in many situations. At the most extreme, a person dying of malaria would certainly relinquish tort rights if necessary to obtain a shot of penicillin from a liability-averse benefactor. The more difficult question is whether a waiver should be imposed upon charitable beneficiaries who are often both unaware of the risks and incapable of rendering a truly voluntary consent.[173]

Laws in some states accept the implied waiver logic by denying relief to a charitable organization's nonpaying beneficiaries while allowing "strangers" or paying clients to sue charitable organizations.[174] Although supported by the implied waiver reasoning, this policy has the perverse effect of denying recovery to individuals most likely to be in need while allowing claims by parties having no connection with a charitable organization to drain its resources.[175]

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171 *See* Bell v. Presbytery of Boise, 91 Idabo 374, 421 P.2d 745, 747 (1966) (abolishing charitable immunity doctrine as a defense to tort action where child injured during church outing).

172 *See, e.g.*, Powers v. Mass. Homeopathic Hosp., 109 F. 294 (1st Cir.), *cert. denied*, 183 U.S. 695 (1901); Myers v. Drozda, 180 Neb. 183, 184-85, 141 N.W.2d 852, 853 (1966).

173 *See* Lipson, *supra* note 1, at 488-89.

174 *See, e.g.*, Egerton v. R.E. Lee Memorial Church, 395 F.2d 381, 382 (4th Cir. 1968); Pomeroy v. Little League Baseball, 142 N.J. Super. 471, 475, 362 A.2d 39, 41 (1976); N.J. STAT. ANN. § 2A:53A-7 (West 1987).

175 *See* President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 825-27 (D.C. Cir. 1942).

To avoid these undesirable outcomes, most states do not distinguish between harm to beneficiaries and "outsiders," and some strictly limit the authority of charitable organizations to extract waivers from their beneficiaries as a condition of being served.[176] On balance, the inequity of the implied waiver rationale for treating the recipients of a charitable organization's services differently from other tort victims outweighs its benefits. Because everyone is assumed to benefit in some way from charitable activity, however, reduction of the magnitude of recovery for any person injured by a charitable organization might be warranted.

E. Special Considerations for Volunteers

Many factors that bear on development of appropriate tort rules for charitable organizations also apply to volunteers. Absence of monetary compensation and service on behalf of society are especially significant. Other features of volunteering render traditional tort rules even less appropriate for volunteers than for charitable organizations. Most siguificantly, tort recoveries against volunteers imperil their personal assets. In this respect, charitable organizations' volunteers are similar to Good Samaritans who gratuitously render assistance during an emergency.[177]

For purposes of developing tort rules for volunteers, the analogy of volunteers to Good Samaritans is of particular interest. At common law, Good Samaritans were fully liable for harm from negligently rendered aid. In response to assertions that this rule discouraged Good Samaritans and imposed liability unfairly, legislatures in every state enacted laws to reduce Good Samaritans' exposure to tort liability.[178] In several respects, the rationale for protecting charitable volunteers from liability is even stronger than for protecting Good Samaritans. Many volunteers are exposed to liability on a continuing basis, which is a greater burden than the exposure during a single emergency.

Nonetheless, freeing volunteers from liability could imperil the charitable sector and the society it serves. Especially for charitable

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176 In striking down waivers, courts have cited a host of public policy considerations, most significantly, that charitable beneficiaries are poorly situated to decide freely whether to surrender potential tort claims in exchange for the services they receive. *See* Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 102, 383 P.2d 441, 447, 32 Cal. Rptr. 33, 39 (1963).

177 *See* Lipson, *supra* note 1, at 500-01.

178 *See, e.g.*, NEB. REV. STAT. § 25-21,186 (1985) (providing immunity for any person who "renders emergency care at the scene of an accident or other emergency gratuitously"); VA. CODE ANN. § 8.01-225 (1989) (providing immunity for any person who "renders emergency care or assistance, without compensation, to any injured person at the scene of an accident . . . ."). *See generally* Comment, *Good Samaritan Laws—Legal Disarray: An Update*, 38 MERCER L. REV. 1439 (1987) (authored by Robert A. Mason).

organizations' directors, some varieties of liability to the organization[179] and the government[180] must be preserved to protect the organization's integrity as well as the public interest.[181] Other varieties of liability are less salutary, however. Each involves a different set of considerations and consequences pertinent to proposals to change existing liability or damages standards.[182]

One approach limits volunteers' personal liability by holding liable the charitable organizations they serve. Such a rule produces incentives for due care in the charitable sector quite comparable to arrangements in government and business. For government and business, the threat of legal liability directly affects the employing entity but not employees.[183] Under the Federal Tort Claims Act,[184] federal employees enjoy complete protection from suit as individuals. In the business world, suits against employees are possible, but rare because state law, business world dynamics, and custom inhibit plaintiffs from suing business employees as "deep pockets."[185]

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179 In general, directors owe their organizations the duties of care, loyalty, and obedience. *See* DANIEL KURTZ, BOARD LIABILITY 21-90 (1988).

180 Liability to the government may arise from tax obligations or regulatory responsibilities. *See, e.g.*, Rev. Rul. 84-83, 1984-1 C.B. 264. Attorneys general in some states are empowered to bring suit on behalf of a charitable organization to enforce a directors' duties to the organization. *See* MARION FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 234-41 (1985); Kenneth Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 449-60 (1960).

181 For charitable organizations:

> [T]here are no shareholders waiting in the wings, assisted by squads of lawyers ready and anxious to commence a derivative action. The stock will not plummet; the organization will not report a decline in earnings or sales—there is no easy way to measure or control the quality of performance.

Abrams, Regulating Charity: The State's Role, 35 Rec. of the City of N.Y.B.A. 481, 486 (1980), *quoted in* D. KURTZ, *supra* note 179, at 49-50; *see also* James Fishman, *Standards of Conduct for Directors of Nonprofit Corporations*, 7 PACE L. REV. 389 (1987); Bennet B. Harvey, Jr., *The Public-Spirited Defendant and Others: Liability of Directors and Officers of Not-For-Profit Corporations*, 17 J. MARSHALL L. REV. 665 (1984); Lizabeth Moody, *State Statutes Governing Directors of Charitable Corporations*, 18 U.S.F. L. REV. 749 (1984).

182 *See generally* articles cited *supra* note 181; F. Anne Ross, *Tort Reform and the Liability of Officers and Directors of Non-profit Organizations*, 28 N.H.B.J. 137 (1987); Roundtable, *The D&O Crisis and Board Liability*, DIRECTORS & BOARDS, Summer 1986, at 8; Note, *1986 Ohio Corporation Amendments: Expanding the Scope of Director Immunity*, 56 U. CIN. L. REV. 663 (1987) (authored by Deborah Cahalane).

Exposing directors and officers to personal liability, while paying them nothing for their services, may cause them to behave extremely cautiously. Personal liability can reduce willingness among directors and officers to have their organizations fill the roles of innovator and path-finder that have led to some of the charitable sector's most valuable contributions to society.

183 *See* Lewis Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1346-47 (1982); Alan Sykes, *The Economies of Vicarious Liability*, 93 YALE L.J. 1231, 1231 (1984).

184 28 U.S.C. § 2679 (1988).

185 *See* Sugarman, *supra* note 118, at 572. Employers may have a legal right to in-

A law protecting volunteers from personal financial loss, while still allowing injured parties to recover from charitable organizations would resemble the rule that permits recovery from a corporation but not its owners. To stimulate capital formation and commercial innovation, corporate shareholders ordinarily are insulated from personal liability.[186] This is true even though shareholders usually benefit to a much greater extent from their corporations' injury-causing activities than volunteers do from services they perform on behalf of charitable organizations. Therefore, by limiting volunteer liability, the tort system can stimulate charitable activity in much the same way it encourages commercial activity, but at a much lower cost.

The analogy of volunteers to corporate shareholders is particularly apt because both provide resources that enable their organizations to function. Although the roles of volunteers and shareholders differ, their similarity as resource providers warrants more attention than it has previously received. Heretofore, the analysis of volunteers' liability has emphasized their participation in harm-causing activities.[187] According to this analysis, full tort liability for volunteers is useful both in deterring volunteers from acting imprudently and in fairly allocating losses between victims and tortfeasors. Shifting to a conceptualization of volunteers as resource providers creates a different analytic perspective. From this perspective a volunteer is similar to a shareholder who provides a corporation with operating capital, fully realizing that the corporation's use of that capital may create a risk of harm to others. Without monetary input from the shareholder, the corporation could cause no losses. Similarly, without labor input of volunteers, charitable organizations could not provide volunteer services, and, therefore, could cause no losses from those services.[188] Limiting volunteers' personal liability and imposing liability on the entities for which volunteers provide resources sensitively balances the interests of injured parties and resource providers.

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demnification from their employees, but as a practical matter indemnification is not sought absent egregious misconduct by an employee.

186 Protecting shareholders from liability is not an essential feature of the corporate form. Until the last hundred years, shareholders were held personally liable in actions against a corporation. *See* Wesley Newcomb Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 283 (1909).

187 *See, e.g.*, Hartmann, *supra* note 10, at 72-76; Comment, *supra* note 81.

188 Although volunteers and employees both render services, volunteers are different in that they are the original source of the labor input. Corporate employees are usually secondary sources whose labor has been purchased with capital raised independently. Because volunteers share characteristics of both employees and shareholders, developing appropriate liability rules for them may require a blending of the liability rules for employees and shareholders.

While the case for liability protection is strongest for volunteers, similar protection may be warranted for charitable organizations' employees. Some employees of charitable organizations are underpaid relative to the value society receives from their services.[189] To the extent they work for wages less than they could command in the business world, they may be considered volunteers.[190] Regardless of their wages, employees in the charitable sector are at a disadvantage relative to employees of business firms in that their employers are less likely to carry insurance that covers them or have adequate resources to indemnify them if they are sued. As a practical matter, the charitable organization employee is more likely to be exposed to financial loss.[191] Therefore, arrangements that protect employees from suit may be desirable if they do not unduly sacrifice other values.

IV

A More Suitable Tort Compensation Arrangement

The preceding analysis establishes that society's interests are optimally served neither by applying ordinary tort rules to charitable actors nor by the recent legislative trend toward insulating charitable actors from liability for negligent acts. The rules and procedures of the Charitable Redress System ("CRS") described in this Part take account of the special characteristics of charitable activity in meeting the tort system's chief objectives of compensating victims, spreading losses, and deterring inappropriately risky activities.

The CRS proposal reorients charitable actors' liability for compensating injured parties from full compensation of a few victims, often long after an incident occurs, to the prompt payment of unreimbursed pecuniary losses to a greater number of injured parties. This treatment is consonant with the charitable objectives of restoring injured individuals to health, alleviating suffering, and meeting the needs of society's least fortunate. The expeditious assistance in satisfying an injured person's pressing financial needs also harmonizes with the charitable ethos. The balancing of interests under the CRS is similar to what states have achieved through workers' compensation systems[192] and what Congress has provided for with the

189 *See* Terry W. McAdam, Careers in the Nonprofit Sector: Doing Well By Doing Good 39 (1986).

190 Alternatively, the work environment may be sufficiently noncomparable that wage differentials simply reflect nonpecuniary benefits that equalize the combined psychic and pecuniary rewards.

191 *See supra* notes 82-83 and accompanying text.

192 *See* Jeffrey O'Connell & Brian Kelly, The Blame Game 127-28 (1986).

National Childhood Vaccine Injury Act.[193] Furthermore, implementation of the CRS would reduce uncertainty in the recovery process and preserve a larger share of charitable resources for public benefit.[194]

In light of the problems with loss spreading in the charitable sector, the CRS relies upon first-party insurance as the primary mechanism for compensating individuals injured by charitable organizations. The CRS shifts a loss to a charitable actor only if the alternative would be leaving the victim with an unreimbursed pecuniary loss. When a loss is shifted, the CRS is designed to operate much like first-party insurance in that the charitable actor or its insurer assumes responsibility for paying expenses as they arise.

To satisfy the equities underlying formulation of the CRS, eligibility for its terms must be limited to organizations, individuals, and activities qualifying as "charitable." Because neither the Internal Revenue Service definition nor any other legally operative definition is perfectly suited for this purpose, this Part considers the most appropriate set of criteria for defining what is "charitable." Finally, this Part considers the possibility of using one of the existing definitions together with additional criteria.

A. Charitable Redress System Features

1. *Overview of Features*

Under the Charitable Redress System, charitable organizations and their insurers would be permitted to settle many tort claims by promptly making a CRS offer. Such an offer would be a standard-

193 National Childhood Vaccine Injury Act of 1986, 42 U.S.C. ¶¶ 300aa-10 to 300aa-34 (Supp. 1988). Persuaded that liability fears were causing pharmaceutical companies to withdraw vaccines from the market, Congress created a fund that effectively caps aggregate liability. Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future*, 48 OHIO ST. L.J. 387 (1987). Under the Act, children injured by a vaccine are compensated for most of their economic losses regardless of whether the manufacturer was negligent.

194 In this regard, payments for claims and insurance premiums are only one aspect of the diversion of charitable resources when charitable actors are subject to liability. An attendant expenditure of resources must be allocated to the attorneys and others who assist the litigation system in establishing fault and assessing damages. *See* J. O'CONNELL & B. KELLY, *supra* note 192, at 123-27. Studies have found that accident victims receive less than half of the amount spent in personal injury litigation. *See, e.g.*, DEBORAH R. HENSLER, MARY E. VAIANA, JAMES S. KAKALIK & MARK A. PETERSON, SPECIAL REPORT: TRENDS IN TORT LITIGATION—THE STORY BEHIND THE STATISTICS 27 (1987) (Rand Corporation publication reporting on its research and surveying the literature). The remainder is absorbed by attorneys' fees and other associated costs.

Arrangements that provide for victims to receive compensation with a minimum of economic friction are preferable. Arrangements that reduce litigation have special appeal to the extent they reduce overall expenses and distress. These same features may be good policy for all tort actions, but they become more acutely desirable when charitable resources are at stake.

form legal agreement obligating the offeror to pay specified economic losses and settlement costs.[195] Extending a CRS offer would protect the organization, as well as its volunteers and employees, from further liability to the injured party.[196] An injured party would not be allowed to recover amounts available from collateral sources. Insurance regulations would be modified slightly to facilitate loss spreading through first-party insurance.

The tort system would remain available to induce charitable actors to make CRS offers whenever liability was likely and to honor obligations assumed under CRS agreements. Injured parties who did not receive a prompt offer and its stipulated payments would be permitted to file a tort claim and recover amounts greater than the CRS award, plus attorneys' fees. The amount recoverable in tort would be a multiple of a standard CRS recovery.

2. *Compensable Damages*

The Charitable Redress System is not designed to compensate for all elements of loss that occur in the course of charitable activity. Instead, awards would be directed toward paying victims' expenses and, when the victim was permanently disabled, the cost of helping the victim adjust to the injury. Thus, monetary damages would not be awarded for noneconomic losses such as pain and suffering, embarrassment, emotional distress, and loss of consortium. Using the simple slip-and-fall scenario at the beginning of this Article, Perry would be compensated for his torn jacket, his medical costs less insurance reimbursements, and a share of any income he may have lost. As in tort, out-of-pocket expenses[197] would be recoverable if reasonably necessary to redress harm resulting from the incident for which compensation is offered.[198] In most instances, property dam-

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195 This arrangement is similar to the "prompt offer alternative" that Professor Jeffrey O'Connell has advanced in other contexts. *See* Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985); O'Connell, *supra* note 162. For a forerunner of O'Connell's proposals, see TERENCE G. ISON, THE FORENSIC LOTTERY 55-79 (1967).

196 The personal liability of volunteers would be limited to the extent of their liability insurance coverage. *See infra* notes 240-48 and accompanying text.

197 Out-of-pocket expenses are the subset of economic loss for which the injured party incurs an actual expense (rather than forgoing receipt of some amount). On "economic loss," see WM. GARY BAKER & MICHAEL K. SECK, DETERMINING ECONOMIC LOSS IN INJURY AND DEATH CASES 2-3 (1987). An out-of-pocket expense need not have been actually paid by the injured party. As discussed below, expenses would be billed directly to the CRS offeror whenever possible. *See infra* notes 227-29 and accompanying text. The out-of-pocket condition is imposed to indicate that only those costs for which the injured party is financially liable are recoverable.

198 *See* DAN D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.1, at 543 (1973) ("Any reasonable expense, adequately proved to be the result of the injury, is an item of damage.").

age would be fully compensated. For bodily injury, compensable expenses commonly would include the full costs of medical treatment, prosthetics, therapy, and rehabilitation. For certain injuries, compensable expenses might include remodeling a residence to make it accessible by a person with a physical impairment, or psychological counseling to deal with disfigurement. Lost earnings and loss of life, both of which entail greater speculation, would be assessed somewhat differently than in tort,[199] and in most instances would be paid periodically rather than in a lump sum.[200]

For nonaccident injuries, the compensation standard is more difficult to apply. With diguitary torts, such as defamation or invasion of privacy, the principal harm may be nonpecuniary. Thus, general damages often are awarded. Under the CRS, the damages against a charitable organization would be limited to actual pecuniary harm, at least where the injury was not inflicted intentionally. However, since dignitary torts generally result from intentional acts, the change may have little effect.

In addition to the changes in treatment of ordinary damages, the CRS requires a different approach to punitive damages. Permitting punitive damage awards against charitable actors would negate the protections of the CRS against nuisance suits and would burden the system with the numerous other flaws of punitive damages actions.[201] Therefore, punitive damages actions brought by private individuals would not be permitted. Eliminating the punitive dam-

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199 The workers' compensation standard for lost income might be substituted for the tort standard. The workers' compensation measure is a compromise between flat-rate wage compensation and full income replacement. The compromise recognizes a societal interest in directing charitable resources toward assistance of workers at the lower end of the pay scale to a greater extent than those in the upper income brackets, who may more readily obtain disability insurance to spread the lost-income risk among others with incomes similar to theirs or may make alternative arrangements to bear a loss of income. *See supra* text accompanying notes 166-67. For a discussion of wage recoveries under workers' compensation, see ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 60.00-60.33 (1988).

200 Either way, collateral sources, including sick leave and life insurance proceeds, would be deducted from the amount to be paid. If the life insurance is paid in a lump sum, the CRS annual payments would be scheduled to begin in the year that the life insurance benefits would have been exhausted if they had been paid according to the CRS plan. If the life insurance benefits are annuitized, the CRS payments would be added each year.

201 Critics of punitive damages catalog a daunting list of their defects including the arbitrariness of jury decisionmaking about punitive damages, the duplication of criminal sanctions without criminal justice safeguards, and multiple awards for the same misconduct. Criticisms of and proposals to modify the law on punitive damages are contained in Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987); Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 663-69 (1980); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984). *See generally Symposium: Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

ages remedy altogether would he undesirable, however, because charitable actors are subject to few other control mechanisms.[202] The possibility of odious behavior under the guise of charitable activity[203] warrants strengthening the enforcement arsenal of state attorneys general[204] by vesting them with the authority to file punitive damages claims against charitable actors *ex relatione*.[205]

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202 Few individuals other than the state attorney general have standing to bring suits to force charitable organizations to comply with state law or their own charters. *See* Harvey, *supra* note 181; Note, *The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits*, 63 N.C.L. REV. 999, 1008-10 (1985) (authored by Brenda Boykin). Enforcement actions by the Internal Revenue Service, although undertaken for the purpose of collecting taxes, end some abuses. *See, e.g.*, *In re* Heritage Village Church & Missionary Fellowship, Inc. [PTL], 87 Bankr. 401 (D.S.C.), *aff'd*, 851 F.2d 104 (4th Cir. 1988).

203 To the dismay of the many truly charitable organizations that operate to benefit their communities, some organizations that have obtained charitable status have engaged in scurrilous or deliberately hurtful activity. For example, despite being organized as a charitable (religious) corporation under California law and exempt from federal income tax under I.R.C. § 501(c)(3), the Church of Scientology engaged in a pattern of decidedly antisocial behavior. Among the Church's policies was one encouraging members to attack any "suppressive person" the church leadership declared to be "fair game." According to church rules, such a person "[m]ay he deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed." *Reprinted in* Allard v. Church of Scientology of Cal., 58 Cal. App. 3d 439, 443 n.1, 129 Cal. Rptr. 797, 800 n.1 (1976), *cert. denied*, 429 U.S. 1091 (1977). The Church later lost its tax exemption. Church of Scientology of Cal. v. Commissioner, 83 T.C. 381 (1984), *aff'd*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988).

Similarly, an organization that has racially discriminatory policies may thereby forfeit its claim to charitable status. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (otherwise charitable schools denied tax exemption because of racially discriminatory policies). Punitive damages in a civil rights suit challenging such discrimination may be warranted. Fraudulent fundraising is another blight on the charitable landscape. *See, e.g.*, Commonwealth v. Watson & Hughey Co., 128 Pa. Commw. 484, 563 A.2d 1276 (1989). Allegations of deceptive and other unsavory practices have become sufficiently serious to gain attention from Congress. In 1989, the Commerce, Consumer Protection, and Competitiveness Subcommittee of the House Committee on Energy and Commerce held hearings to determine whether the Federal Trade Commission should be empowered to regulate charitable solicitation. *See MacLeod Suggests Congress Give FTC Authority Over Non-Profit Charities*, 57 Antitrust & Trade Reg. Rep. (BNA) No. 1427, at 152 (Aug. 3, 1989); Sandra Evans, *Tougher Fund-Raising Laws Urged*, Wash. Post, July 29, 1989, at B8, col. 1.

204 Historically, the other obligations of state attorneys general have inhibited their vigorous prosecution of abuses in the charitable sector. *See* M. FREMONT-SMITH, *supra* note 180, at 234-41; Karst, *supra* note 180, at 449-60. Giving attorneys general authority to pursue punitive damages claims on behalf of aggrieved citizens might energize enforcement generally by providing a financial incentive to press cases. Although an attorney general is less likely than the aggrieved party to pursue the matter, placing the responsibility for enforcement under state control should produce more uniform results and reduce the vulnerability of charitable organizations and their staffs to baseless suits that are brought because of anger or misunderstanding.

205 *I.e.*, if the organization was directly responsible for the injurious conduct or policy. An action for punitive damages could not rest upon *respondeat superior* alone. Traditionally, *respondeat superior* has not sufficed to support imposition of punitive damages, but the rule has been so weakened in many jurisdictions that it needs to be made explicit

Under the CRS, a charitable organization would be liable for punitive damages only if it sanctioned conduct deliberately undertaken with knowledge that it would cause unjustifiable harm.[206] When this standard is met, punitive damages would serve their appropriate functions of punishing the defendant and deterring misconduct.[207] Moreover, if an organization has engaged in activities that warrant imposition of punitive damages under this standard, concern about diverting charitable resources is substantially mooted. The conduct supporting a punitive damages award could not be considered "charitable" under any recognized definition of that word. By engaging in such conduct, the organization would have been violating the public trust and misusing whatever resources it had available. Because the organization would have already deviated from its charitable mission, holding it liable for punitive damages would not divert resources from the accomplishment of charitable purposes to the usual extent. Moreover, with the attorney general alone empowered to bring the claim, any amount paid could be added to the state treasury for public use.[208]

The CRS would provide for deducting from the award any amount the offeree is entitled to receive from a collateral source.[209]

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under the CRS. *See* Comment, *Punitive Damages and Nonprofit Corporations: To Make the Punishment Fit the Crime*, 19 U.S.F. L. REV. 377 (1985) (authored by Michele Berdinis Fagin). Punitive damages actions against an individual would not be subject to the "sanctioned" requirement.

206 Formulating a standard that precisely captures the notion that punitive damages should be triggered by conduct in gross violation of defensible societal norms is extremely difficult. Several variations of the formulation offered above may be more suitable depending on how the courts in a particular jurisdiction have interpreted the key terms. On formulation of a standard for the imposition of punitive damages, see Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 20-23 (1982); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 20-28 (1982).

207 Other purposes of punitive damages include compensating victims for otherwise uncompensable losses, but this is not an appropriate objective of the CRS. *See* Ellis, *supra* note 206, at 1, 12 (contending that punitive damages are justifiable when they both deter and punish); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982) (resting justification on accomplishment of either deterrence or punishment).

208 To encourage aggrieved parties to inform the attorney general of situations that may warrant filing a punitive damages claim, a portion of the recovery might be allocated to the "finder." Some states currently apportion punitive damages awards between the state and private party plaintiffs. *E.g.*, COLO. REV. STAT. § 13-21-102(4) (1987) (one-third paid to state treasury); FLA. STAT. ANN. § 768.73(2)(b) (West Supp. 1989) (60% paid to Medical Assistance Trust Fund or General Revenue Fund); UTAH CODE ANN. § 78-18-1(3) (Supp. 1989) (50% of amount in excess of $20,000 paid to state treasury).

209 Collateral sources are contractual arrangements and public welfare supports that pay for expenses an individual incurs as a result of a tortious incident. RESTATEMENT (SECOND) OF TORTS § 920A (1979). Although traditional tort law does not call for reducing awards by the amount of collateral sources, several states have recently modified

This serves two purposes: it most completely allows first-party insurance to spread losses incurred in the course of charitable activity, and it limits recoveries from charitable activity to the pecuniary loss actually suffered. If private health insurance paid all the medical bills from an accident, the CRS offeror would have no financial liability. If the insurance was subject to a deductible or copayment amount, liability would exist only to that extent.

Denying double recovery for insured amounts and awarding nothing for noneconomic loss prevents the victim from receiving an amount above economic loss with which to pay the costs of obtaining the award.[210] Accordingly, those costs must be shifted explicitly to the CRS payor.[211] Under the CRS, payments to victims' attorneys would be made on the same basis as other allowable expenses.[212] These expenses are likely to be insubstantial in most cases because an attorney would have little to do.[213] The structure of the CRS process minimizes the need for extended negotiations. Moreover, once a CRS offer is extended, and the offeree is foreclosed from pursuing a tort claim in court, rarely would there be any need for the expensive process of taking depositions, consulting experts, and engaging in other activities that have the sole function of establishing fault at trial.

Finally, charitable actors could not be held jointly and severally liable. The chief justification for joint and several liability is the superior ability of the defendant to spread the loss.[214] Because loss

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the collateral source rule. *See* Stanton G. Darling, II, *Selected Tort and Civil Justice Issues Before the 117th Ohio General Assembly*, 48 OHIO ST. L.J. 365, 369 (1987). Some states have modified their laws to deduct amounts received from collateral sources that constitute a "free" benefit to the injured party, but still allow duplicate recovery based on a private health insurance contract. *See, e.g.*, COLO. REV. STAT. § 13-21-111.6 (1987).

210 *See* Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 334-38 (reprinting passages from *The Accident Swindlers: A Special Report*, Chicago Sun-Times, Feb. 10-15, Feb. 24-29, Mar. 11, 1980).

211 Although requiring a losing defendant to pay the victor's attorneys' fees is not the norm in American law, neither is it wholly novel. *See* RESTATEMENT (SECOND) OF TORTS § 914(1) (1979) (stating general rule that parties pay their own litigation expenses). Fee shifting is common throughout the world and in isolated corners of American law. Most courts are empowered to assess costs against any litigant who abuses the legal process by filing a baseless suit. *See, e.g.*, FED. R. CIV. P. 11. Steeped in the American tradition that litigants pay their own attorneys, judges use this power very infrequently. *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 652-53 (1974).

212 Expenses are to be directly billed to the CRS offeror if feasible or reimbursed at the claimant's option.

213 Nonetheless, injured parties may need simple legal assistance in evaluating their claims and securing redress, regardless of whether they contemplate litigation.

214 *See* Smith v. Dep't of Ins., 507 So. 2d 1080, 1091 (Fla. 1987); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728 (1968).

spreading works so poorly in the charitable sector,[215] this rationale does not apply.

3. *Insurance Modifications*

State insurance regulations would need to be amended slightly to support use of first-party insurance as the primary vehicle for spreading the risk of loss from charitable activity. First, once a charitable organization made a CRS offer, an offeree's health, life, auto, and other first-party policies would have to pay as if the injury occurred without fault. This condition is necessary to trigger payments that an insurer might otherwise withhold in expectation of shifting the loss to a third-party tortfeasor. The rule must clarify that first-party insurance pays first to avoid a stalemate over responsibility to pay. Additionally, the financial obligation of the CRS payor must be limited to losses in excess of the victim's insurance benefits.[216]

By itself, this rule might result in insurers penalizing policyholders for having filed an insurance claim arising from a loss caused by a charitable actor. Prohibiting insurers from penalizing policyholders in this way would advance the objective of spreading losses from charitable activity as broadly as possible. This prohibition is especially important with respect to automobile insurance, for which insurers typically raise rates or cancel coverage based on the number of claims filed.[217] Without a prohibition against adverse use of claims in the underwriting process, injured parties might lose their insurance or pay higher premiums because of accidents they did not cause. This result would defeat the objective of spreading losses from charitable activity as broadly as possible.

4. *The CRS Offer*

The CRS offer would be a standard-form agreement obligating the charitable organization or its insurer to pay all compensable costs[218] in accordance with the terms discussed below.[219] Because CRS offers would be standardized, the range of issues open to negotiation would be narrow and the likelihood of swift settlement would be much higher than under ordinary tort rules.[220] The principal de-

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215 *See supra* notes 138-48 and accompanying text.

216 By implication, a first-party insurer has no right to subrogation from a CRS payor.

217 Lisa S. Howard, *Auto Rates Affected By Diverse Factors*, NAT'L UNDERWRITER, PROPERTY & CASUALTY, June 13, 1988, at 9, 11.

218 Compensable costs are specified in *supra* notes 197-215 and accompanying text.

219 *See infra* notes 223-29 and accompanying text.

220 The only variability would pertain to prospective economic loss not met through a structured settlement. This uncertainty might tend to discourage settlement, except

terminant of settlement assessment would be probability of recovery if the case went to trial.[221] Variation in jury awards would no longer influence the decision because a jury finding of liability would merely trigger an obligation to compensate upon the same terms as a CRS offer, albeit at a multiple of what the defendant would have been obligated to pay if the case had been settled without trial.[222]

a. *Prompt Offer Triggers CRS*

To injured parties with few resources, the timing of a recovery may be of greater interest than the amount.[223] The possibility of a large award sometime in the distant future does little to satisfy the immediate need to pay bills. If unable to secure funds quickly, an individual may fail to obtain adequate treatment and commence rehabilitation promptly. All of this is incompatible with the major charitable objective of alleviating the suffering that results when injured parties are unable to pay for needed services. The CRS provides for direct payment of expenses by the CRS offeror as quickly as possible after the precipitating incident.

Ideally, a CRS offer would immediately follow an incident, so injured parties would experience minimal uncertainty and financial distress. As a practical matter, however, investigation and formal approval will necessitate some delay in many cases.[224] The CRS balances the need for prompt payment against the need for investigation and formal approval by imposing a 90-day time limit for threshold offers that activate a portion of the CRS features, and a 180-day limit for full CRS offers.[225] A threshold offer differs from a

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that the alternative recovery in tort would be equally uncertain. Even in these instances, an offer may be extended with the amount to be paid subject to determination by a court or other neutral party.

221 An injured party who does not receive a CRS offer would be permitted to sue and potentially recover damages 50% higher than the CRS net amount, plus attorneys' fees. *See infra* notes 230-32 and accompanying text.

222 *See infra* notes 230-32 and accompanying text.

223 *See* T. ISON, *supra* note 195, at 14; Marc Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 780 (1967).

224 Reorienting charitable organizations toward swiftly meeting victims' pecuniary losses may lead some organizations to adopt policies that go beyond what the CRS requires. The policy of one large metropolitan museum for responding to slip-and-fall accidents provides an example of a model that may become more common. Aware that the museum was sued routinely for slip-and-fall accidents, the museum's board of directors authorized prospective payment of emergency medical services to such victims. In a typical incident, injured patrons are transported immediately to a hospital emergency room where they receive appropriate medical attention at the museum's expense. In the years since adopting this policy, the museum has not been sued. Statement of James Strickland, President, Human Services Risk Management, at the Nonprofit Sector Risk and Insurance Forum, in Chicago, Ill. (Nov. 11, 1988).

225 Making an offer within the time periods forecloses the offeree's right to sue. Either offer may be extended sooner than the expiration of these time periods, which

full offer in that it obligates the offeror to pay only expenses incurred as of the date of the offer or during the time the offer remains in effect. A threshold offer assures its recipient of payment for expenses incurred immediately following the incident, but does not obligate the offeror to pay all future expenses.[226]

b. *Expenses to be Paid as Incurred*

Receiving an offer to pay expenses promptly greatly reduces the hardship victims face when presented with uninsured medical bills or other expenses after an injury. Actually having those bills paid completes the process. Under the ordinary tort system, victims usually must pay their own bills and await settlement of their claim for reimbursement.[227] The CRS would reduce the need for victims to front payments by having CRS offerors pay compensable expenses directly to the service provider whenever possible and having the offerors reimburse victims swiftly when direct payment is not possible. In a typical incident, the victim may need to pay emergency expenses incurred before a CRS offer has been tendered, but the 90-day limit on making a threshold offer should shift payment responsibility to the offeror before payment is necessary. Although the CRS would not absolve injured parties of personal responsibility for the bills,[228] it could greatly reduce typical cash-flow problems.[229]

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begin to run when the charitable organization receives a written claim from the injured party. Where liability is clear and the necessary authorization available quickly, the threshold offer step could be eliminated. Conversely, an offer may be made after the time limits. If so, however, the offeree would be free to reject it and sue in tort.

226 The threshold offer would be useful if a potential offeror needs more than 90 days to assess liability and obtain approval for a full offer. Until deciding whether to extend a full offer or cancel the threshold offer, the offeror must honor the CRS offer's terms or become subject to the penalties for noncompliance.

227 The Model Periodic Payment of Judgments Act allows plaintiffs (and defendants) to choose periodic payments in some circumstances. *See* HANDBOOK NAT'L CONF. COMM'RS ON UNIFORM STATE LAWS & PROC. ANNUAL CONF. 187 (1980). At least 10 states have passed legislation authorizing some type of periodic payment arrangement. *See* Darling, *supra* note 209, at 368.

228 Imagine, for example, that an uninsured organization becomes bankrupt shortly after an incident and leaves no assets. In this situation, the victim is left without recourse. The victim is no worse off, however, than he or she would be under the present tort system. On the whole, the CRS will reduce the impact of bankruptcy on victims' claims by reducing the average delay between an incident and the time claims begin to be paid. Settlement delays currently can result in a bankruptcy occurring several years after an incident, destroying a victim's prospect of recovery. *See* Comment, *The Case of the Disappearing Defendant: An Economic Analysis*, 132 U. PA. L. REV. 145 (1983). Under the CRS, such occurrences will be diminished whenever an organization opts to meet the CRS requirement of prompt, periodic payment.

229 Only if service providers demand payment from the patient or client at the time of service will the utility of the direct payment feature be thwarted. Because the CRS payments would often come from the liability insurance carrier for the responsible charitable organization, rather than the organization itself, service providers are likely to accept the third-party payment on the same basis as they accept payment from first-party

In cases of death or long-term disability, a lump sum payment may be necessary to allow insurers to close their books and protect offerees from insurer insolvency. At the end of three years, either the CRS payor or the recipient may elect to terminate periodic payments in favor of a final lump sum settlement, which may be annuitized. Failure to reach agreement on the amount could lead to a trial or arbitration on that single issue, with the CRS payor being obligated to pay the recipient's attorneys' fees if the offeree is awarded an amount higher than the offer.

5. *Modified Tort System Available If No Offer Extended*

If a charitable organization declined to make a CRS offer,[230] or if a CRS offeror failed to honor its commitments, the tort system would remain available as a last resort. If a tort suit ensued, the CRS would not modify the liability standard, but would change the measure of damages. To maximize the utility of the CRS as an alternative compensation scheme, damages at trial would be figured as a multiple of what the plaintiff would have been entitled to receive under the CRS, plus attorneys' fees. The difficulty here is setting the proper multiple. If plaintiffs could recover only the CRS net award, charitable organizations and their insurers would have insufficient economic incentive to make CRS offers.[231] Using the ordinary tort damages standard, on the other hand, would give injured parties too much power to threaten charitable organizations that resist settlement of baseless claims. An appropriate balance might be achieved by allowing a recovery in tort of one and one-half times the CRS net award, plus attorneys' fees.[232] If too many merit-

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insurers. Nonetheless, some providers undoubtedly will demand payment from the individual receiving service. In such situations, the CRS payor would become immediately liable to the individual for reimbursement.

230 If the organization extends a threshold offer and thereafter declines to make a full CRS offer, evidence of the threshold offer and payments made pursuant to it would be inadmissible in a subsequent trial for the purpose of proving liability. If liability is established, the payments would be deducted from the amount of the award.

231 The depressive effect on settlement offers of reduced damages standards at trial has escaped notice by some tort reform proponents. For example, the Attorney General's Working Group disingenuously concluded that eliminating recovery for pain and suffering would not affect offers made for other injuries. THE CURRENT CRISIS, *supra* note 99, at 66-69.

The fallaciousness of the Working Group's assertion is easy to see in the following hypothetical case. Assume that a victim has compensable expenses of $100,000. If an insurer knows that $100,000 is the maximum recovery after trial (plus attorneys' fees), the insurer might prudently offer to settle the claim for a lesser amount, especially if liability were less than certain. A victim, especially one who needs money immediately to pay creditors, might be inclined to accept the offer rather than endure the delays and uncertainty of trial. *See* H. LAWRENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 230 (1970).

232 By changing the values to be used in probability calculations, the CRS should

less suits are filed, a state could levy attorneys' fees on unsuccessful plaintiffs[233] or use other techniques to discourage litigation without unduly impeding access to the courts.

The level of damages must also be established for situations in which the parties enter into a CRS agreement and the offeror subsequently fails to honor its obligations or delays payments. At the time of the offer, the amount ultimately to be paid will often be uncertain because a CRS offer is a commitment to pay all compensable expenses as they arise. Given this ongoing responsibility of a third party to make payments, disputes between the payor and claimant over the legitimacy of claims are likely to occur in some cases.[234] Awarding costs of obtaining compliance plus interest with a penalty of fifty percent of the contested amount for nonpayment and ten percent for late payment should induce compliance. In most cases, these narrowly defined disputes could be resolved satisfactorily without invoking a trial court's jurisdiction.

To avoid the delays of litigation, a CRS offer might include a clause providing for alternative dispute resolution.[235] If both parties agreed, the alternative mechanism could have exclusive and nonreviewable jurisdiction, except that a judicial forum would be available to remedy a CRS offeror's gross failure to honor its obligations. Proof of such failure would entitle the offeree to double dam-

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induce settlement of claims that otherwise would not be paid, but not all claims. By using the same measure of damages (except for the multiplier) for a CRS award, a court-imposed award reduces the factors involved in deciding whether to make an award to estimates of the probability of prevailing at trial. Based on the known risk of a 50% increase in the size of the award, charitable organizations' economic interests would be served by making offers where the estimated likelihood of victory is less than .67. Factoring attorneys' fees into the equation would reduce the figure to about .5. Thus, in cases in which the charitable organization will probably be held liable for the harm, the matter should be resolved without litigation.

233 Some courts impose such an arrangement in some types of litigation. *See, e.g.*, Cbristiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (civil rights). At least one commentator has proposed a system similar to the CRS, *see* Jeffrey O'Connell, *Balanced Proposals for Product Liability Reform*, 48 OHIO ST. L.J. 317, 318 (1987). *See generally* WARREN FREEMAN, FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES 101-42 (1987) (discussing available sanctions for meritless claims and defenses in general).

234 As mentioned above, disputes may arise over either attorneys' fees or recoverable losses. Imagine a woman falling on the rickety stairs of a community development center and breaking her arm. Through its insurer, the center promptly makes a CRS offer. Among the bills presented thereafter is a $500 fee from the woman's chiropractor. Investigation reveals that the bill is for several therapeutic sessions the woman received after her fall that were part of a series begun previously and billed at twice the rate of the earlier sessions. Believing both that the bill is excessive and that it is for service unrelated to the broken arm, the community center's insurer refuses to pay it.

235 For a discussion on the utility of alternative dispute resolution, see JONATHAN MARKS, EARL JOHNSON, JR. & PETER SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION (1984).

ages. No proof of liability for causing the underlying injury would be required.

6. *CRS Offer Protects Volunteers and Employees from Personal Liability*

Another feature of the CRS proposal affords charitable organizations the power to protect their volunteers and employees from personal liability.[236] Tendering a CRS offer[237] and fulfilling its terms in good faith would insulate not only the organization, but also its volunteers and employees from suit for CRS-covered injuries. This feature would reduce concerns about volunteers' and employees' personal liability[238] and would prevent injured parties from both enjoying the benefits of the CRS's prompt payment features and later pursuing an action against an individual defendant for a full tort recovery.[239]

By altering the measure of damages, rather than changing the liability standard for volunteers, the CRS would send appropriate signals about the degree of care a volunteer should exercise. Board members would still owe duties to their organizations because the CRS would not limit recovery for pecuniary harm that a director's breach of duty might cause. Finally, it should be noted that state enactment of a law based on the CRS could not diminish liability

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236 Volunteers of organizations that do not qualify as charitable under the standards established for the CRS would be unaffected. The considerations involved in estahlishing liability rules for other types of volunteers are sufficiently different to render the CRS less satisfactory. For governmental volunteers, the greater ability of the sponsoring entity to spread losses makes indemnification a more appealing option. For nonprofit organizations that are not charitable, the greater possibilities for personal henefit and the permissibility of the organization using its assets solely to advance the interest of its limited membership offset the vulnerability of the volunteer.

237 In most situations, the charitable organization would make the CRS offer, but the option would also he available to a volunteer or employee who faces personal liability because the organization lacks the resources to meet the obligations a CRS offer would entail.

238 Through indemnification or insurance, charitable organizations in most states can approximate this result up to the limits of their liability coverage or available assets. *See* D. KURTZ, *supra* note 179, at 101-07.

The California legislature enacted a statute in 1987, in response to the adverse impact of personal liability on volunteerism as well as the difficulty charitable organizations faced in obtaining liability insurance. CAL. CORP. CODE § 5239 (West Supp. 1989). The statute protects volunteer directors and officers from third-party suits if the organization maintains liability insurance or "if the board of directors of the corporation and the person had made all reasonable efforts in good faith to obtain available liability insurance." For a discussion of the statute, see Thomas Silk, *Annual Survey of Federal Tax Law and California Legislation Affecting Nonprofit Organizations: 1987*, 22 U.S.F. L. REV. 713, 729-33 (1988). Some other states similarly predicate protection of volunteers from liahility on their host organizations maintaining insurance coverage. *See, e.g.*, KAN. STAT. ANN. § 60-3601 (Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 5-312(b) (1989).

239 A plaintiff might still employ such a strategy if a charitable orgamization and noncharitable actor jointly caused the harm.

under federal civil rights legislation, the Internal Revenue Code, or other federal laws that authorize penalties against individuals in their individual capacities.[240]

7. *Volunteers' Personal Liability Limited to Insurance Coverage*

Currently, a person injured by a charitable organization may usually seek recovery from both the organization and one or more individuals who caused the harm. In response to reports of volunteers withholding their services because of personal liability fears, every state has modified the liability rules for at least some types of volunteers within the last few years.[241] Some of these new laws go far toward their stated objectives of protecting volunteers from liability for ordinary negligence and misjudgment, but others provide little real protection.[242] Many change the liability standard from negligence to gross negligence,[243] which may require a plaintiff's lawyer to do nothing more than redraft a complaint to assert gross negligence when suing a volunteer. Moreover, the laws in half the states apply only to volunteer directors and officers, and not to direct service volunteers.[244]

For volunteers who face personal exposure because their sponsoring organizations have neither liability insurance nor sufficient resources with which to pay claims, either under the CRS or otherwise, personal liability for unintentionally caused harm should be limited to the extent of the volunteer's applicable liability insurance, if any.[245] Limiting volunteers' liability to the extent of their insur-

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240 One of these forms of liability, tax liability, is discussed in Steven Cole, *Volunteerism Can Be Taxing*, Nat'l L.J., Nov. 13, 1989, at 13.

241 *See supra* notes 54-55 and accompanying text.

242 *Compare* MONT. CODE ANN. § 27-1-732 (1989) (excludes only willful or wanton misconduct) *with* GA. CODE ANN. § 14-3-113.1 (1989) (no protection unless individual acted "[i]n good faith," and "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances").

243 *See, e.g.*, DEL. CODE ANN. tit. 10, § 8133 (Supp. 1988) (but allows suits arising from negligent operation of a motor vehicle); MD. CTS. & JUD. PROC. CODE ANN. § 5-312 (Supp. 1989).

244 *See, e.g.*, CAL. CORP. CODE § 5047.5 (Deering Supp. 1989); VA. CODE ANN. § 13.1-870.1 (1988).

245 Because claims against volunteers are infrequent, *see supra* notes 71-72 and accompanying text, the fight over liability standards for volunteers has little to do with compensating victims. The problem of volunteer liability is attributable almost exclusively to the exposure to suit rather than the actual incidence of claims. No data suggest that individuals injured during charitable activity currently receive substantial compensation from volunteers. In the two years the author directed the Nonprofit Sector Risk & Insurance Project, he was unable to discover a single incident in which a tort victim recovered against the personal assets of a volunteer. Neither was such an incident brought to the attention of Congress when the Senate held hearings on the Volunteer Protection Act. *Hearing on S. 929*, *supra* note 71. In some cases, however, volunteers have incurred substantial legal costs to extricate themselves from a lawsuit.

ance coverage would produce almost exactly the same benefit as barring claims against them, while allowing recovery if the volunteer has insurance available to spread the loss.

Individuals ordinarily do not have the option when purchasing insurance of choosing whether their volunteer activities will be covered;[246] either the policy form is worded to include such coverage or it is not. Bargaining over the language is rarely an option. Thus, limiting volunteers' liability to their insurance coverage would have at most a de minimis effect on volunteers' insurance purchasing decisions. If necessary, an insurance regulation could be adopted to prohibit excluding coverage of charitable activity otherwise within a policy's scope.[247]

The rule would make the bases for purchasing insurance to cover charitable activities more similar to the bases for purchasing insurance to cover business activities. If volunteers are seen as resource providers like shareholders,[248] charitable organizations should not need to purchase insurance to protect them from personal liability. If volunteers are seen as employees, charitable organizations should be able to obtain coverage for them as a standard term of policies that protect the entity. Many general liability insurance policies explicitly exclude volunteers,[249] however, thereby requiring charitable organizations to incur additional costs to provide their volunteers with as much protection as businesses ordinarily provide employees. Under the CRS, charitable organizations would have less incentive to purchase such additional coverage, again more nearly equating their insurance situation with that of business firms.

B. Ambit of the CRS

Justification for almost all features of the CRS rests upon the special attributes of charitable organizations and volunteers. A ma-

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246 *See* sources cited *supra* note 82.

247 For a similar proposal, see C. TREMPER, *supra* note 2, at 85-89. Making coverage for volunteer activities a mandatory feature of homeowners, renters, and other personal insurance policies would spread the risk broadly enough so that underwriting difficulties could be effectively disregarded.

Rather than mandating that volunteer activities be included within the coverage of standard personal policies, a rule might require that insurers offer this coverage as an endorsement to personal lines policies and be prohibited from cancelling or refusing to write a policy if an individual chooses the endorsement. This alternative would allow individuals who feel they need such protection to purchase it and would not burden all policyholders with a hidden, albeit infinitesimal, cost. In the absence of administrative action, courts might interpret policies to provide this coverage in order to effectuate the reasonable expectations of policyholders.

248 *See supra* notes 186-88 and accompanying text.

249 *See supra* note 81 and accompanying text.

jor difficulty in applying special rules to charitable actors is specifying which entities and individuals qualify. This section suggests criteria for determining which "charitable organizations" and "volunteers" should qualify for the CRS and also recommends exclusions for torts occurring in the course of certain types of activity.

1. *Charitable Organizations*

For purposes of the CRS, several alternative means of designating qualified organizations might be used. To accord fully with the rationales for limiting the tort liability of charitable organizations, qualification should depend on the organization producing externalized public benefits, operating for community betterment, and refraining from distributing its profits to private parties. CRS goals would be further effectuated by limiting the extent of fee-for-service financing and requiring that an organization direct its beneficence toward society's least fortunate members.

Although no extant legal test for charitable status strictly requires all of these characteristics, several tests share some of the assumptions and rationales advanced for the CRS. Unlike a new definition, existing legal standards offer the advantage of familiarity and greater certainty as to whether an organization qualifies. The discussion below examines the suitability of existing definitions and offers suggestions for alternative approaches that would tailor the criteria for qualification more closely to the rationales for the CRS.

a. *I.R.C. § 501(c)(3)*

The exemption provisions of section 501(c)(3) of the Internal Revenue Code offer the most widely recognized official designation of charitable status. Although the qualification standards for section 501(c)(3) are grounded on a policy determination that certain types of organizations should not be taxed at the ordinary rates, the definition is suitable for use in the CRS as well. Already a number of state laws use section 501(c)(3) status as the criterion for reduced tort liability of an organization or its personnel.[250]

Section 501(c)(3) criteria approximate the features of charitable organizations that justify liability limitations for them. As discussed in Part II, to qualify for tax exemption under section 501(c)(3), an organization must operate for the public benefit and refrain from distributing its net earnings to private parties.[251]

250 *See, e.g.*, ILL. ANN. STAT. ch. 32, para. 108.70 (Smith-Hurd Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 5-312(a)(4) (1989); MASS. GEN. L. ch. 231, § 85W (1989); N.C. GEN. STAT. § 1-539.10 (Cum. Supp. 1989); 42 PA. CONS. STAT. ANN. § 8332.2 (Purdon Supp. 1989).

251 *See supra* notes 28-31 and accompanying text.

The principal differences between the section 501(c)(3) standard and the qualities warranting special tort rules are that an organization need not externalize public benefits or serve only society's least fortunate members in order to qualify for the charitable exemption.[252] An organization may be exempt if it satisfies certain operational conditions, for example, being educational or scientific, regardless of whether it recoups full value from the direct recipients of its services. Thus, the Educational Testing Service ("ETS") qualifies for exemption even though its revenues from testing equal or exceed its expenses.[253] Whether such an organization produces an exterualized public benefit is not entirely clear. The ETS does waive its fees for some impoverished test takers and may keep its prices below what a for-profit firm would charge. By engaging in a type of activity that Congress wishes to encourage—promoting education—ETS and similar organizations may produce some level of externalized public benefits, albeit of a magnitude only slightly greater than many business firms.

Qualifying for tax exemption clearly does not necessitate serving the least fortunate members of society, however. For some time, the IRS took the position that its test for "charitable" status should not be severed completely from charity's ancient roots of service to the poor and distressed. Although vestiges of that position still occasionally appear, the IRS and the courts have largely abandoned that condition in favor of a "modern" understanding of "charitable" that broadens the section 501(c)(3) category.[254]

b. *Modified Section 501(c)(3) Criteria*

Because the criteria for tax exemption are so well established and roughly suitable for use in the tort context, the best strategy for specifying CRS qualification standards may be to modify the section 501(c)(3) criteria slightly rather than adopt a wholly independent

252 *See* WILLIAM WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987); Susan Ostrander, *The Problem of Poverty and Why Philanthropy Neglects It*, in THE FUTURE OF THE NONPROFIT SECTOR, *supra* note 20, at 103.

253 *See* ALLAN NAIRN, THE REIGN OF ETS 260-93 (1980); *The Pleasures of Nonprofitability*, FORBES, Nov. 15, 1976, at 89.

254 The controversy received its most thorough public airing when the I.R.S. eliminated the requirement that section 501(c)(3) hospitals must serve the poor to the extent of their available resources. Rev. Rul. 69-545, 1969-2 C.B. 117. Members of the disadvantaged class sued on the grounds that the I.R.S. was misconstruing the meaning of "charitable" for the purpose of tax exemption. In Eastern Kentucky Welfare Rights Organization v. Shultz, 370 F. Supp. 325 (D.D.C. 1973), the district court accepted that argument, but the appeals court reversed, concluding that the word "charitable" is "capable of a definition far broader than merely the relief of the poor." Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1287 (D.C. Cir. 1974). (The case went to the United States Supreme Court, where the Court resolved it on the grounds that plaintiffs lacked standing. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976)).

test. The easiest approach would be to consider federal tax exemption as necessary but not sufficient.[255] Requirements regarding one or both of the following conditions might be added: donative support and service to the needy. The chief drawback of adding either of these conditions is that they are not in standard use for any other purpose. Thus, an organization's status for purposes of the CRS would never be certain without litigation, a proposition antithetical to the aims of the proposal.[256]

Limiting the CRS to organizations that receive public support in the form of contributions and volunteer labor restricts applicability of the CRS more closely to those organizations for whom it is designed.[257] The less an organization depends on fee-for-service income, the closer is the fit with the rationales based on redistribution of resources and the aberrations of using charitable organizations for loss spreading.[258] The principal issue to resolve with regard to donative financing is the percentage of revenue that must be derived from donations and volunteer labor rather than fees for services. The best available analogy is the test the Internal Revenue Service uses to determine whether an organization provides services "substantially below cost" in determining whether services that otherwise would not be charitable can qualify as charitable because of their donative element.[259] Unfortunately, this is not one of the more precise tests in the tax realm. A figure of ten to twenty-five percent below cost suffices, based on additional factors. The higher end of that range would satisfy the donative financing rationale for special tort rules.

Adding a requirement that an organization materially assist the needy would most nearly align qualification for the CRS with the justifications for receiving that special treatment. Unfortunately, it also would be a very difficult condition to put into practice. Service to the poor is a fairly close substitute that is capable of verification—assuming agreement about who is poor—but would disqualify some organizations to which the CRS justifications apply equally well. Disaster relief organizations like the American Red Cross, for exam-

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255 With the exception of limitations on political activity, all of the tax exemption criteria are appropriate for the tort context.

256 As a practical matter, the issue could almost always be resolved through a summary judicial hearing based on the submission of financial documents alone. If volunteer labor is counted toward donative support, which would be consistent with the rationale for requiring donative financing, the necessary proof would be somewhat less readily verifiable.

257 The inapplicability of the CRS to commercial activities of otherwise qualified charitable organizations achieves almost the same result. *See infra* notes 271-79 and accompanying text.

258 *See supra* notes 138-48 and accompanying text.

259 *See* Rev. Rul. 72-369, 1972-2 C.B. 245; Rev. Rul. 71-529, 1971-2 C.B. 234.

ple, deliver vital services to individuals who may be able to pay for the services they receive, albeit not at the time they need them. The difficulty of formulating a general standard for serving the needy may warrant the use of the selective designation approach discussed below.[260]

c. *State Law Standards*

For various reasons, many states do not rely upon federal tax law in distinguishing charitable organizations from other nonprofits. Some states use a test other than federal tax exemption for determining which organizations are exempt from state taxes,[261] and several states apply different criteria for determining which organizations are governed by special tort rules.[262] Some of these alternative criteria are more permissive than the federal tax exemption standard,[263] but others are tighter and more consistent with the CRS rationales. For example, drawing upon a prior Minnesota opinion, the Utah Supreme Court has identified the following factors as pertinent to determining whether an organization qualifies as "charitable" for purposes of exemption from the state ad valorem tax:

> (1) whether the stated purpose of the entity is to provide a significant service to others without immediate expectation of material reward; (2) whether the entity is supported, and to what extent, by donations and gifts; (3) whether the recipients of the "charity" are required to pay for the assistance received, in whole or in part; (4) whether the income received from all sources (gifts, donations, and payment from recipients) produces a "profit" to the entity in the sense that the income exceeds operating and long-term maintenance expenses; (5) whether the beneficiaries of the "charity" are restricted or unrestricted and, if restricted, whether the restriction bears a reasonable relationship to the entity's charitable [*i.e.*, permissible] objectives; and (6) whether dividends or some other form of financial benefit, or assets upon dissolution, are available to private interests, and whether the entity is organized and operated so that any commercial activities are subordinate or

260 *See infra* notes 269-70 and accompanying text.

261 *See* PETER SWORDS, CHARITABLE REAL PROPERTY TAX EXEMPTIONS IN NEW YORK STATE 156-57 (1981); Comment, *Real Estate Tax Exemption for Federally Subsidized Housing Corporations*: Rio Vista Non-Profit Housing Corp. v. County of Ramsey, 64 MINN. L. REV. 1094, 1096-97 (1980).

262 *See* Krpan v. Otis Elev. Co., 226 F. Supp. 293 (E.D. Pa. 1964); Allison v. Mennonite Publications Bd., 123 F. Supp. 23 (W.D. Pa. 1954); IND. CODE ANN. § 34-4-11.5-1 (West. Supp. 1989).

263 For example, in Tennessee, "tax exemptions in favor of religious, scientific, literary and educational institutions are liberally construed, rather than strictly." George Peabody College for Teachers v. State Bd. of Equalization, 219 Tenn. 123, 128-29, 407 S.W.2d 443, 445 (1966).

incidental to charitable ones.[264]

States applying such a test for tax exemption could also use that status as a determination for the CRS and thereby provide a means of determining in advance of an incident which organizations qualify.

Some states also distinguish between public benefit and mutual benefit organizations. California[265] and New York[266] divide organizations along these lines, as does the Revised Model Nonprofit Corporation Act.[267] These state law categories have been developed principally to facilitate the application of different corporation law rules depending on who controls an organization and how assets may be distributed at dissolution rather than on what the organization does.[268]

As currently constituted, the public benefit category of the Revised Model Nonprofit Corporation Act and similar state codes does not accord with CRS rationales as well as does section 501(c)(3) status. Being more flexible than federal tax law, however, the public benefit standard might be tailored to suit the CRS quite well. If a state legislature considers its state definition a more satisfactory standard for CRS qualification, it could be used.

d. *Designated Charitable Organizations*

Another option would be to limit the CRS to particular organizations or narrowly delimited categories of organizations that have been specifically designated by an appropriate government body. This approach would permit fine-tuning the ambit of the CRS to make it available only to charitable organizations that are especially

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264 Utah County v. Intermountain Health Care, Inc., 709 P.2d 265, 269-70 (Utah 1985); *see also* North Star Research Inst. v. County of Hennepin, 306 Minn. I, 236 N.W.2d 754 (1975) (identifying factors necessary for charitable tax-exempt status); American Museum of Fly Fishing, Inc. v. Town of Manchester, 557 A.2d 900 (Vt. 1989) (stating test for public-use tax exemption).

265 *See* CAL. CORP. CODE §§ 5000-10,846 (West Supp. 1981).

266 *See* N.Y. NOT-FOR-PROFIT CORP. LAW § 201 (McKinney 1970 & Supp. 1990).

267 REVISED MODEL NONPROFIT CORPORATION ACT § 1.40(23), (28) (1988).

268 The least restrictive example of this approach is offered by the Revised Model Nonprofit Corporation Act, which requires organizations to choose whether to incorporate as public benefit or mutual benefit corporations, but does not define the terms. On the one hand, the commentary to the Model Act asserts that the two categories are neutral with respect to purposes and merely establishes different rules that require organizations of each type to be operated in certain ways. Nonetheless, statements such as "[p]ublic benefit corporations hold themselves out as benefitting society," *id.* at xxvi, suggest that the drafters of the code see a functional difference in the categories as well. Because only the public benefit category imposes a nondistribution constraint, any organization seeking section 501(c)(3) status would need to choose the public benefit alternative. The two categories substantially overlap, but are not coextensive. The New York and California laws contain criteria which make the public benefit category more suitable for the CRS.

vulnerable to tort liability. If a legislature determined that tort suits were impairing only certain types of organizations that the state valued, this would be the preferred approach.

For example, some states currently set special liability standards for charitable organizations that sponsor amateur rodeos or conduct certain sports programs.[269] Rather than altering the criteria for holding these organizations liable, states may prefer to make them subject to the CRS. Legislatures could identify qualifying organizations, or designate a state official to make that determination. For example, the director of the state human services department could certify organizations that would provide needed services but for the prohibitive cost or unavailability of liability insurance.

Instead of enumerating categories of organizations covered by the CRS, legislatures may prefer to apply the CRS to all charitable organizations and enumerate only exceptions. Both in abrogating charitable immunity and in subsequently enacting limitations on the tort liability of charities or volunteers, some states have explicitly excluded incidents occurring at hospitals.[270] The apparent rationale for this exclusion is that hospitals now operate primarily on a fee-for-service basis. While they retain their tax-exempt status, resulting in lower costs to patients, the fee-for-service basis of their operations justifies using the tort system for loss spreading.

2. *Exclusion of Business Activities*

Charitable organizations that engage in commercial activities raise different issues for tort liability. Commercial activities are suitable mechanisms for loss spreading and generally do not produce positive externalities of the type commonly produced by charitable activities.[271] Even when charitable immunity was the norm, some states recognized an exception to the doctrine for harm arising from a charitable organization's business activities.[272] Some judicial

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269 *See, e.g.*, MASS. GEN. L. ch. 231, § 85V (1989); 42 PA. CONS. STAT. ANN. § 8332.1(a) (Purdon Supp. 1989).

270 *See, e.g.*, Lyon v. Tumwater Evangelical Free Church, 47 Wash. 2d 202, 287 P.2d 128 (1955) (recognizing charitable immunity for a church after court had previously abrogated charitable immunity for hospitals); OHIO REV. CODE ANN. § 2305.38 (Baldwin Supp. 1989) (volunteer protection statute does not diminish immunities provided for in § 2305.25, which states that individual or hospital is relieved from liability arising from treatment of a patient).

271 The objective of operating a business is to raise revenue in excess of cost. The existence of profit in the business context is an indicator that the business produces benefits in excess of its costs to society, including tort loss costs. If a charitable organization cannot operate a business profitably on that basis, the activity is not a socially efficient means of raising revenue. None of the rationales set forth in this Article justifies applying the CRS to ordinary business operations, regardless of whether a charitable organization happens to run the business.

272 *E.g.*, Kaltrider v. YMCA, 457 F.2d 768, 770 (6th Cir. 1972) (interpreting Ohio

opinions and statutes have recognized that the rationales for applying special tort rules have little force when applied to a charitable organization's business activities by allowing recovery against a charitable organization up to the amount of its noncharitable assets.[273] Similarly, a charitable organization's unrelated business income is not exempt from federal taxation.[274]

The general premise of the unrelated business income tax is that a profit-making enterprise should pay tax regardless of whether it dedicates its profits exclusively to charitable purposes.[275] Such a policy is necessary to prevent charitable organizations from using tax savings to compete unfairly against taxable enterprises and potentially undermine the tax revenue base.[276] For the CRS, the competitive advantage that may follow from reducing charitable organizations' liability-related expenses supports similar treatment of business operations. The terms of this exclusion should differ somewhat from the tax exclusion of unrelated business income, though, because the rationales for the CRS differ from the rationales for tax exemption.[277]

For tax purposes, the distinction between related and unrelated business income rests on a sound basis. For tort liability, however, no strong reason justifies distingnishing between the two types of

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law); Kasten v. YMCA, 173 N.J. Super. 1, 7, 412 A.2d 1346, 1350 (1980). Massachusetts, which otherwise limits charitable organization's tort liability to $20,000, allows full recovery "if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes." MASS. GEN. L. ch. 231, § 85K (Cum. Supp. 1989).

273 *See supra* notes 58-59 and accompanying text.

274 I.R.C. § 511 (1989).

275 Section 502 of the 1983 Internal Revenue Code specifically provides for taxation of "feeder organizations," separately incorporated businesses that give all their proceeds to charity. At one time, the IRS applied the destination of income test, which provided exemption to any organization as long as its revenue was used exclusively for charitable purposes. *See* Trinidad v. Sagrada Orden De Predicadores, 263 U.S. 578, 581 (1924). By adding section 502, the Revenue Act of 1950 explicitly nullified the destinatiou of income test. *See* SICO Found. v. United States, 295 F.2d 924 (Ct. Cl. 1961), *reh'g denied*, 297 F.2d 557 (Ct. Cl. 1962).

276 *See* Clarence LaBelle Post No. 217 v. United States, 580 F.2d 270, 272 (8th Cir.), *cert. dismissed*, 439 U.S. 1040 (1978); W. HARRISON WELLFORD & JANNE G. GALLAGHER, UNFAIR COMPETITION?: THE CHALLENGE TO CHARITABLE TAX EXEMPTION 5-11 (1988).

The Internal Revenue Code attempts to take away all tax-related advantages that might enable charitable organizations to operate an unrelated business in unfair competition with tax-paying firms. In addition to the unrelated business income provisions, I.R.C. § 514 provides a complex set of rules aimed at neutralizing the tax benefits accruing to a charitable organization that uses debt-financed property in the acquisition of a business.

277 The unrelated business income tax falls only on commercial activities that are not "substantially related" to the purpose that gives rise to exemption. *See* I.R.C. § 513(a) (1989). Under this rule, enterprises such as campus bookstores and museum gift shops generally are not taxable even if they operate at a profit and compete directly with privately owned enterprises. *See* Treas. Reg. § 1.513-1(d)(1) (as amended in 1983).

income. Moreover, practical difficulties would arise if an injury occurred in the course of an activity producing both related and unrelated business income. For example, a medical society that publishes a magazine may receive exempt income from member subscriptions and taxable income from advertising.[278] Which liability rules would apply if an injury occurred during the publishing process? Unlike income, which can be fractionally allocated, a liability claim cannot be resolved in part under one set of rules and in part under another.

The only remaining rationale for applying the CRS when harm occurs in the course of a charitable organization's business activities is that the business proceeds are used for charitable purposes. This is a strong justification, but the analysis of Part III of this Article finds it insufficient in and of itself to warrant deviating from standard tort law.

The scope of the CRS should exclude any profit-making trade or business of a charitable organization.[279] In practice, this exclusion would occasionally create an issue of whether an injury-causing incident occurred in the course of a trade or business. To avoid uncertainty, charitable organizations could isolate their profit-making activities by incorporating them separately or otherwise clearly delineating them. Such arrangements would have the salutary effect of making the charitable sector's activities more purely charitable.

V

CONSTITUTIONALITY OF THE CHARITABLE REDRESS SYSTEM

Federal and state constitutional provisions provide several bases for challenging almost any attempt to modify the tort system. Arguments against the constitutionality of the Charitable Redress System may be based on equal protection, due process, or a variety of state constitutional provisions pertaining to the courts. This danger of invalidation on constitutional grounds is not merely speculative; courts have invoked each of these grounds when invalidating various legislative restrictions on tort rights.[280]

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278 *See* United States v. American College of Physicians, 475 U.S. 834, 847-50 (1986).

279 This proviso would leave most traditional fund-raising and investment activities within the CRS's scope. The Internal Revenue Code definition of trade or business in section 513 could be used for this purpose.

280 *See infra* notes 287-302, 303-07 and accompanying text; *see also* Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis*, 32 VILL. L. REV. 1299 (1987); Kenneth Vinson, *Constitutional Stumbling Blocks to Legislative Tort Reform*, 15 FLA. ST. U.L. REV. 31 (1987).

Under the federal constitution, grounds for attacking the CRS are quite limited. The few United States Supreme Court opinions in this area give legislatures substantial freedom to alter common-law tort liability and damages.[281] Commentators generally agree with this viewpoint.[282] The Court upheld the aggregate damages limit that Congress imposed in the event of a nuclear power plant accident[283] and dismissed for want of a substantial federal question an appeal of a state supreme court decision upholding a medical malpractice damages cap.[284] Unless the Court deviates substantially from precedent, the CRS appears safe from a federally based challenge, although some lower federal courts have found constitutional infirmities in contested "tort reform" measures.[285]

Challenges to legislative restrictions on tort recoveries have met with greater success when based on state constitutions.[286] The variety of state constitutional provisions precludes definitive assessment of the constitutionality of the CRS within the scope of this Article, but the major sources of vulnerability can be examined. As a general matter, the CRS compares favorably with state law modifications that have passed constitutional review and it does not have any of the major features that have led to invalidation. Of particular importance is that the CRS embodies a trade-off of features, not merely a reduction of tort claimants' rights. The CRS provides for lower compensation of individuals injured in the course of charitable activity in exchange for a greater likelihood of some recovery for such individuals as well as higher levels of charitable activity and the

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281 *See* text accompanying notes 283-84.

282 *See* Sugarman, *supra* note 118, at 617 n.270. Sugarman asserted:

> I have long been unimpressed with the claim that states cannot simply repeal tort law for personal injuries without thereby depriving people of due process rights. Such thinking reflects a long-past era of judicial intrusion into legislative policymaking in the area of economics and social welfare on substantive due process grounds.

Id.

283 *See* Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59, 88 (1978); *see also* New York Cent. R.R. v. White, 243 U.S. 188 (1916) (rejecting constitutional challenges by employers to workers' compensation system).

284 *See* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985).

285 *See, e.g.*, Waggoner v. Gibson, 647 F. Supp. 1102, 1105-07 (N.D. Tex. 1986) (Medical Malpractice Act which limited recovery to $500,000 regardless of extent of injury violated equal protection clause).

286 *See* Turkington, *supra* note 280, at 1302. State constitutions cannot restrict any rights guaranteed by the United States Constitution, but they may provide an independent basis for additional rights that do not undercut the Constitution's guarantees. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353 (1984).

community benefits that result from it. Moreover, the CRS does not completely bar access to the courts or arbitrarily limit recoveries.

A. Equal Protection and Substantive Due Process

The CRS invites an equal protection challenge because it creates different legal rights depending on the nature of the claim, the status of the defendant, and the amount of damages sought. Because several CRS provisions would touch various constitutionally protected rights, the CRS would also be vulnerable to an attack based on substantive due process, which would differ very little from an equal protection claim.[287]

The fate of previous constitutional challenges along these lines has depended principally upon the standard of review that courts have applied.[288] The few courts that have conceived of a damages limitation as infringing a fundamental interest typically have invoked strict scrutiny analysis and invalidated the law. For example, in *Kenyon v. Hammer*,[289] the Arizona Supreme Court predicated its strict scrutiny analysis on a provision of the state constitution that creates a fundamental right to bring and pursue tort claims, including medical malpractice actions.[290] Although recognizing the compelling state interests in reducing the cost of medical care and increasing the availability of such care, the court found those interests insufficient to overcome the discriminatory effect of the special privilege that the law conferred upon one class of defendants.[291] Similarly, other courts have held that damage caps violate equal

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287 Instead of objecting to the distinctions a statute creates, a substantive due process attack focuses on the statute's diminution of pre-existing rights. Because the basis for the claim would be the rights that the CRS affects rather than the classes it creates, analysis under substantive due process would be almost indistinguishable from analysis under equal protection. As Justice Stewart insightfully observed, if the claim is that a law infringes upon a right and not that it disadvantages a class, equal protection "is no more than substantive due process by another name." Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring in the judgment).

288 *See* Ronald E. Waguer & Jesse M. Reiter, *Damage Caps in Medical Malpractice: Standards of Constitutional Review*, DET. C.L. REV. 1005, 1006-11 (1987). Even when interpreting their own constitutions, state courts generally use the levels of review that the United States Supreme Court has developed for federal equal protection analysis.

289 142 Ariz. 69, 688 P.2d 961 (1984).

290 ARIZ. CONST. art 2. § 31.

> [T]he imposition of an absolute bar three years from the date of injury on most—but not all—medical malpractice claimants, the abolition of general tolling provisions recognized for all other tort claims and the internal distinctions between classes of medical malpractice claimants, all discriminate against and among medical malpractice claimants in a manner which infringes upon fundamental rights.

142 Ariz. 69, 86, 688 P.2d 961, 979 (1984).

291 It is one thing, however, to regulate by classification in setting up reasonable periods within which to bring an action, and it is another thing to confer a special privilege upon one class of defendants by effectively abol-

protection because they provide full recovery to individuals with small claims, while denying a full recovery to individuals with more serious and costly injuries.[292]

Courts that have ruled that damage limits do not infringe a fundamental right have generally invoked the rational basis test for equal protection review.[293] Under traditional rational basis review, courts have permitted legislatures to address problems "one step at a time."[294] When applying the rational basis test to laws providing for different tort rules in some situations, most courts have upheld the laws. Even under rational basis review, however, some courts have invalidated damage caps that produced no benefits in exchange for denying recoveries to seriously injured individuals.[295]

Because the interests at stake in tort litigation do not clearly meet the criteria that the Supreme Court has established for identifying fundamental rights,[296] yet are closely tied to rights that the federal and state constitutions explicitly protect, an intermediate level of review provides the most suitable mode of analysis.[297] This form of equal protection jurisprudence requires judges to assess the strength of the interests on each side of the policy and to examine

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ishing the opportunity for those with even the most meritorious claims to assert them.

142 Ariz. 69, 87, 688 P.2d 961, 979 (1984).

292 *See, e.g.*, Carson v. Maurer, 120 N.H. 925, 944, 424 A.2d 825, 838 (1980) ("[A] statute which singles out seriously injured malpractice victims whose future damages exceed $50,000 and requires one class to shoulder the burden inherent in a periodic payments scheme from which the general public benefits offends basic notions of fairness and justice."). This holding was limited by Statl v. Brosseau, 124 N.H. 184, 470 A.2d 869 (1983) (Douglas & Batchelder, J.J., concurring specially) (continued existence of sovereign immunity depends on whether restrictions placed on injured party's right to recovery are outweighed by the benefits conferred to the general public).

293 *See, e.g.*, Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P. 2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985); Turkington, *supra* note 280, at 1310-13.

294 Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955). The California Supreme Court cited *Lee* in upholding a periodic damages payment arrangement that applied only to medical service providers. American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, 36 Cal. 3d 359, 370, 683 P.2d 670, 677, 204 Cal. Rptr. 671 (1980) (en banc).

295 *See, e.g.*, Waggoner v. Gibson, 647 F. Supp. 1102, 1105-07 (N.D. Tex. 1986); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978); Baptist Hosp. Inc. v. Baber, 672 S.W.2d 296, 298 (Tex. Ct. App. 1984).

296 *See* Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986).

297 As early as Dandridge v. Williams, 397 U.S. 471, 508-21 (1970), Justice Marshall expressed his preference for a sliding scale analysis that would require the court to examine "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Id.* at 521 (Marshall, J., dissenting). For a more recent discussion, see City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 468-72 (1985) (Marshall, J., concurring in the judgment in part, dissenting in part).

the closeness of the fit between a statute's ends and means. Courts that have used an intermediate level of review in assessing the constitutionality of tort modifications have reached mixed results.[298]

Some state courts require that an offsetting benefit to injured parties accompany any legislative reduction of common-law tort claims.[299] Not all courts insist upon this quid pro quo standard,[300] however, and the United States Supreme Court has cast great doubt upon its necessity under the federal constitution. In dictum the Supreme Court has stated, "[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy."[301]

Because the CRS does not merely limit damages, but instead offers a comprehensive alternative to ordinary tort rules, much like workers' compensation, it may satisfy the quid pro quo test. The CRS should be constitutionally unobjectionable, especially if courts take account of all the benefits of adopting it. However, if courts limit their inquiry to the balance of benefits and losses to injured parties entitled to compensation under ordinary tort rules, the CRS may be vulnerable.[302]

Attempting to apply the quid pro quo test to the CRS may lead courts to question the appropriateness of the test itself. If the status quo is charitable immunity, adopting the CRS would actually result in enhanced recoveries for plaintiffs and hence not raise a due process issue. In states that accepted charitable immunity at the time they adopted their constitutions but subsequently abandoned the doctrine, the outcome of a challenge might depend on the historical moment that a court chooses for comparison. Are limitations on

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298 *See, e.g.*, Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) (case remanded to determine if a substantial relationship existed between damages cap and state interests in enacting it).

299 *See, e.g.*, *Waggoner*, 647 F. Supp. 1102; Smith v. Dep't of Ins., 507 So. 2d 1080, 1088 (Fla. 1973); Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (providing shorter statute of limitations for minor medical malpractice plaintiffs than other plaintiffs invalid because it effectively abolished a minor's right to bring a well-established common-law cause of action without providing a reasonable alternative).

300 *See, e.g.*, Lucas v. United States, 807 F.2d 414, 421-22 (5th Cir. 1986); Fein v. Permanente Medical Group, 38 Cal. 3d 137, 162-63, 695 P.2d 665, 683, 211 Cal. Rptr. 368, 386, *appeal dismissed*, 474 U.S. 892 (1985).

301 Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59, 88 (1978); *see also* New York Cent. R.R. v. White 243 U.S. 188, 198 (1916) (rejecting constitutional challenges to workers' compensation system).

302 Benefits that less directly offset limitations on injured parties' recoveries have not always entered into a court's assessment of whether the quid pro quo is sufficient. *See, e.g.*, Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736, 742 (1976) (lower insurance premiums and lower medical expenses for all members of society not sufficient to offset loss of recovery by malpractice victims).

tort recoveries permissible if they are no more restrictive than the common law has ever been? Or is the modification of common-law liability unidirectional and nonreversible, that is, can courts and legislatures adopt rules that increase recoveries but not thereafter cut back? The odd results of this analysis suggest the inadvisability of placing too much emphasis on the recoveries and limitations at common law. Tort law has long been in flux and is likely to continue its evolutionary development as circumstances change. Using the due process clause to constrict legislatures' flexibility arbitrarily freezes the legal status quo.

B. Other Constitutional Issues

While equal protection and due process have been the workhorses in plaintiffs' assaults on damage limitations, they have not borne the load alone. Arguments based on procedural due process, the right to jury trial, separation of powers, prohibitions against special legislation, access to the courts, and a right to recover damages have also been mounted, sometimes successfully.[303] The CRS may be susceptible to attack on these grounds in some states, although the better-reasoned opinions have rejected such contentions in cases challenging tort modifications that are not as evenly balanced as the CRS.

Although based on slightly different specific constitutional provisions, most of the precedents in this area turn on consideration of the appropriate roles of courts and legislatures in establishing and enforcing tort rules. In abolishing charitable immunity, the Florida Supreme Court declared that the state constitution's guarantee of court access prohibits all limitations on tort recoveries.[304] The Kansas Supreme Court reached the same conclusion based on the guarantee in the Kansas Bill of Rights that every person have a legal remedy.[305] More recently, courts have used similar grounds to invalidate a wide variety of procedural tort modifications.[306]

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303 *See infra* notes 304-06 and accompanying text; *see also* Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 290-92 (1987); Vinson, *supra* note 280, at 45.

304 *See* Wilson v. Lee Memorial Hosp., 65 So. 2d 40 (Fla. 1953); *see also* Oien v. City of Sioux Falls, 393 N.W.2d 286 (S.D. 1986) (law extending government immunity to various municipal operations violates right to court access).

305 Neely v. St Francis Hosp. & School of Nursing, Inc., 192 Kan. 716, 720, 391 P.2d 155, 158 (1964) (statute that confers immunity from process on nonprofit hospitals violative of section 18 of the Kansas Bill of Rights which provides that all persons injured "in person, reputation or property, shall have remedy by due course of law, and justice administered without delay").

306 *See, e.g.*, Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983) (review panel violates rigbt of access to courts); Hardy v. VerMeulen, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987), *cert. denied*, 484 U.S. 1066 (1988) (statute of limitations barring medical malprac-

Although interpreting either of these provisions as prohibiting legislative modification of tort remedies is contrary to the weight of authority,[307] the possibility of such an interpretation must be acknowledged. Prospects of invalidation are dimming though, as more states shift toward the majority view.

The supreme courts of both Montana and Virginia recently adopted the majority position despite previous opinions nullifying legislative tort modifications. In an opinion containing a lengthy discussion of the historical purposes of constitutional protection of courts' integrity and availability to the public, the Montana Supreme Court upheld a legislative limitation on recovery for wrongful termination of employment. In *Meech v. Hillhaven West, Inc.*,[308] the court specifically overruled a 1985 holding that a law extending governmental immunity to certain municipal operations violates the right to redress.[309] Similarly, in *Etheridge v. Medical Center Hospitals*,[310] the Virginia Supreme Court held that the Virginia Constitution does not prohibit legislative modification of tort rules. This decision rendered ineffective an earlier federal district court's contrary interpretation of the state constitution.[311] With respect to the right to jury trial, *Etheridge* followed the United States Supreme Court view that the guarantee protects only trial rights existing at common law, which did not include plenary authority for juries to award damages.[312] Regarding the separation of powers, the court concluded that the power to create or modify a remedy lies with the legislature.[313]

Of special note is the 1989 Massachusetts Supreme Judicial Court's decision in *English v. New England Medical Center, Inc.*[314] *English* upheld a 1971 statute that abolished charitable immunity but limited a charitable organization's liability to $20,000. Although the

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tice claims brought more than four years after alleged malpractice even if plaintiffs did not or could not have known of their injuries violates right to remedy).

307 [A] constitutional provision that courts of justice shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation, is not intended as a limitation upon the legislative branch of the government where the legislation involved deals with rightful subjects of legislation.

16A AM. JUR. 2D *Constitutional Law* § 616, at 564 (2d ed. 1979).

308 238 Mont. 21, 776 P.2d 488 (1989).

309 Pfost v. State, 219 Mont. 206, 713 P.2d 495 (1985).

310 237 Va. 87, 376 S.E.2d 525 (1989).

311 Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986). The district court's rulings that the Virginia law violated provisions of the United States Constitution were reversed in Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989), which is consistent with results in other circuits.

312 *Etheridge*, 237 Va. at 96, 376 S.E.2d at 529 (citing Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88-89 n.32 (1978)).

313 *Id.* at 101, 376 S.E.2d at 532.

314 405 Mass. 423, 541 N.E.2d 329 (1989), *cert. denied*, 110 S. Ct. 866 (1990).

court devoted most of its opinion to rejecting the plaintiffs' due process attack, the court also expressed agreement with the majority position that a damage limitation does not infringe upon constitutionally protected jury trial rights.[315]

A review of the precedents strongly suggests that the CRS should pass constitutional muster in every state, although the issue will be in doubt in some states until a judicial determination is made. Because the CRS is a balanced and comprehensive modification of tort rules for charitable organizations and volunteers, much like workers' compensation systems, it should survive constitutional attack even in states that have rejected piecemeal or asymmetrical tort modifications.

CONCLUSION

Implicit in every decision to modify or discontinue an activity because of an undesirable level of injuries is the assumption that the change will result in less harm. For most activities, this assumption undoubtedly is correct. For example, installing air bags in automobiles should reduce injuries from traffic accidents both because the airbags will better protect motorists and because the additional cost of airbags will reduce the total amount of driving. The injury-reducing consequences of the first factor are readily predictable if the air bags operate effectively. The effect of reduced driving on injuries is not as predictable, however. Total iujuries will be lower only if the substitute activities of would-be drivers are less injury-producing. What if everyone who can no longer afford an automobile purchases a motorcycle and rides it as much as they would have driven an automobile. Injuries quite probably would rise!

In the charitable sector, the current tort system routinely produces the negative result of a relatively safe activity giving way to a much riskier alternative. Consider the low-budget youth sports program that conducts a baseball league each summer with poorly trained volunteer coaches on an ill-kept diamond. Under these circumstances, injuries might well occur and suits for negligence could lie. The preferable response to this prospect of liability would be a baseball league with better coaches and improved facilities. However, assuming fixed resources—a reasonable assumption in the charitable sector—the more likely alternative is discontinuation of the program. Without organized baseball, will the children who had been on the teams sit in their rooms reading books or engaging in other activities with a lower probability of injury? Doubtful. They

315 *Id.* at 426-27, 541 N.E.2d at 331-32; *see also* Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980).

are more likely to continue playing ball without adult supervision on whatever field they can find or to engage in some other unsupervised activity that entails risks many times greater than the national pastime.

This example could be multiplied a thousand times across the charitable sector. The alternative to a hazardous homeless shelter is more likely to be no shelter than one that is safe and secure. Moreover, allocating resources to improve a shelter will ordinarily necessitate serving fewer homeless people. The consequences in this arena are much different than those that occur if a hotel is built with fewer rooms but greater safety features, or with its full complement of rooms to let at a higher rate.[316] The tort system provides hotel operators and guests with an appropriate set of economic cues for making a cost-benefit analysis. In the charitable sector, those cues are badly distorted. Although the imposition of liability points charitable actors in the direction of greater care, the ordinary tort damages standard deters them inappropriately because charitable actors do not receive a full economic return for the benefits they produce.

The Charitable Redress System offers a better alternative for encouraging prudence and compensating tort victims. By relying primarily on first-party insurance and goverument assistance programs, the CRS would spread many losses without the inefficiencies of shifting them to a third party. Recognizing the often desperate need for money by injured individuals who neither have private insurance nor qualify for government assistance, the CRS would compel charitable organizations to provide financial assistance. As a result, more of the individuals who are severely economically disadvantaged by an accident or other loss would receive compensation and would receive it swiftly.

Under the CRS, incentives and protections that are more suitable for the charitable sector would replace the tort system's distorting effects on charitable activity. Volunteers would no longer need to risk their personal assets when they serve their communities. On the whole, charitable organizations could reduce their liability-related expenses while simultaneously increasing their liability insurance coverage to provide a source of recovery for harm that they cause.[317] Tort victims would receive compensation at a level

316 In these scenarios the market will establish a level of safety consistent with consumer demand. At the bottom end of the market, especially for private goods provided without cbarge, choices among gradations of quality (safety) may be replaced by a dichotomous choice between availability and nonavailability.

317 Adopting the CRS would create an opportunity to reduce charitable organizations' liability-related expenses, but would not do so directly. The essential mediating step is appropriate adjustment of liability insurance premiums. If insurers treat charitable organizations like business firms, the CRS will have little effect on charitable

more nearly equivalent to the benefits that charitable organizations ordinarily provide to their beneficiaries. The combination of these advantages weighs heavily in favor of the Charitable Redress System over either ordinary tort rules or the current legislative trend to raise liability standards for some charitable organizations and volunteers.

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organizations' actual liability-related expenses regardless of reductions in claims costs. Because the handling of cases under the CRS will differ from the handling under the tort system, separate data collection and analysis will become ever more critical for fair insurance pricing.

If insurers do not reduce premiums, charitable organizations may move more rapidly toward alternatives to the commercial insurance market such as pools and risk retention groups. Although the need for large sums of money to capitalize these alternative mechanisms impedes their creation by small charitable organizations that might benefit most from their operation, the potential savings may trigger an infusion of funds from private foundations and other sources. The viability of these alternatives is demonstrated by the handful of entities that currently exist to serve a broad spectrum of charitable organizations. *See* B. STONE & C. NORTH, *supra* note 80, at 26-28; Christina Lee, *Non-Profits Scrounge for Cover: Some Groups Forming Pools*, J. Commerce, July 31, 1989, at 9A, col. 4; *Nonprofit Organizations Grapple With the Vagaries of Liability Insurance*, Wall St. J., June 22, 1989, at 1, col. 4. An even greater number of alternative risk financing mechanisms operate on behalf of relatively homogeneous portions of the charitable sector, *e.g.*, hospitals, schools, and religious institutions. *See* Gilbert Fuchsberg, *Colleges Forming Liability-Insurance Companies to Guarantee Coverage, Keep Premiums Down*, Chron. Higher Educ., Nov. 16, 1988, at A29, col. 3.